TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL., PETITIONERS,

vs.

SELBY OIL & GAS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1942.

CERTIORARI GRANTED DECEMBER 14, 1942.

INDEX.

INDEX—Continued

INDEX—Continued

CAPTION.

BE IT REMEMBERED, That at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Robert J. McMillan, presiding, and holding its sessions at San Antonio, Texas, for the Austin Division, which said term began on the 10th day of June, A. D. 1940, and continued in session to and included the 18th day of July, A. D. 1940, there came on to be heard and determined, among other causes pending on the docket, the following cause:

No. 27 CIVIL ACTION.

SELBY OIL & GAS COMPANY and LEWIS PRODUCTION COMPANY,

versus

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON, AND G. A. SADLER, MEMBERS OF THE RAILROAD COMMISSION OF TEXAS, O. L. HASTINGS and C. F. DODSON.

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2 STIPULATION DESIGNATING RECORD ON APPEAL.

In the District Court of the United States for the Western District of Texas, Austin Division.

Selby Oil & Gas Company and Lewis Production Company, Plaintiffs,

vs. Civil Action No. 27.

Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, Defendants.

Appellants Selby Oil & Gas Company and Lewis Production Company, plaintiffs in the above entitled and numbered cause, and Appellees Railroad Commission of

Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, defendants in the above entitled and numbered cause, by and through their attorneys of record, stipulate and agree that the following shall be contained in the printed record on the appeal of the above case, to-wit:

1. Stipulation designating record on appeal.

2. Original complaint.

3. Answer of O. L. Hastings and C. F. Dodson.

4. Answer of Railroad Commission, Lon A. Smith, Ernest O. Thompson, and G. A. Sadler.

5. Amendment to answer of Railroad Commission.

6. Motion of defendants O. L. Hastings & C. F. Dodson to dismiss for want of jurisdiction.

7. Motion of defendants O. L. Hastings and C. F. Dodson to dismiss for want of equity, and subject thereto their first amended answer.

8. Amendment to answer of Railroad Commission (Second amendment).

9. Amendment to complaint.

10. Order of Court suspending trial for purpose of letting Railroad Commission take further action.

11. Judgment.

12. Notice of appeal, and acknowledgment of service of notice of appeal.

12-a. Motion for order directing that original exhibits be sent up as a part of the record on appeal.

3 13. Appeal bond.

14. Order directing original exhibits to be forwarded.

15. Transcript of evidence.

The above constitute a complete record of all the proceedings and evidence had in the United States District Court in this cause.

(S.) DAN MOODY,
Attorney for Appellants Selby Oil & Gas Company and Lewis Production Company.
Austin, Texas.

(S.) W. EDWARD LEE,
Attorney for Appellees O. L. Hastings and C. F. Dodson.
Longview, Texas.

GERALD C. MANN,
By JAMES P. HART,
Attorney for Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler.
Austin, Texas.

Filed 14th day of October, 1940.

4 COMPLAINT.

(Title Omitted.)

To Said Honorable Court:

Plaintiffs Selby Oil & Gas Company and Lewis Production Company bring this, their complaint, against the Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler, members of the Railroad Commission of Texas, and O. L. Hastings and C. F. Dodson, and thereupon complain and allege as follows:

I.

The jurisdiction of the subject-matter and parties in this cause is vested in this Court upon the following grounds:

(a) Plaintiff Selby Oil & Gas Company is a corporation duly organized and existing under the laws of the State of Delaware and a citizen of said State; and Plaintiff Lewis Production Company is a corporation duly organized and existing under the laws of the State of Pennsylvania and a citizen of said State. Defendant Railroad Commission of Texas is a department and agency of the Government, organized and existing under the laws of the State of Texas, located at Austin, Travis County, Texas; Defendants Lon A. Smith, E. O. Thompson and G. A. Sadler, the duly elected, qualified and acting members of the Railroad Commission of Texas, are citizens of the State of Texas and each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas. Defendants O. L. Hastings
5 and C. F. Dodson are citizens of the State of Texas and reside in Overton, Rusk County, Texas.

(b) The value of the property and the amount involved are in excess of $3,000.00, exclusive of interest.

(c) The order complained of in this case, granting to Defendants Hastings and Dodson a permit to drill Well No. 2 on their alleged 3.85-acre Dickson tract, Mary Cogswell Survey, Rusk County, Texas, operates to deprive Plaintiffs of their property without due process of law, and therefore is violative of the Fourteenth Amendment to the Constitution of the United States.

(d) This action is also brought under Chapter 76, Section 14, Acts of the Regular Session of the Forty-fourth Legislature (Article 6049c, Section 8, Vernon's Annotated Texas Civil Statutes, 1925), as an appeal to this Court (*Reagan vs. Farmer's Loan & Trust Co.*, 154 U. S. 362, 391-392) attacking as arbitrary and unreasonable the hereinafter alleged order of the Railroad Commission, as well as on the federal question raised by this pleading.

II.

On November 26, 1919, the Defendant Railroad Commission of Texas adopted and promulgated what is known as Rule 37, governing the spacing of oil and gas wells in the oil and gas producing areas in the State of Texas. Thereafter, on or about September 4, 1931, and May 29, 1934, the Railroad Commission of Texas amended Rule 37 in so far as said rule applied to the East Texas oil field, of which field the acreage involved in this suit is a part, and provided in such amendments that thereafter no wells should be drilled for oil or gas in the East Texas field at any point less than 330-feet from any property or division line, or less than 660-feet from any other completed or drilling well on the same or adjacent tract, provided the

Commission in order to prevent waste or to prevent the confiscation of property would grant exceptions in the manner set forth in such rule. Said amendments to the spacing rule dated May 29, 1934, are valid and binding rules and regulations, and govern the spacing and drilling of oil wells in the East Texas field, and have continuously remained in effect since the date of their adoption and are now in effect. Under said amended Rule 37, now in effect, no one is authorized to drill an oil or gas well in the East Texas oil field at any point less than 660-feet from any drilling or completed well or less than 330-feet from any property or division line, except by special permission from the Railroad Commission granted under the terms of such rule in order to prevent waste or to prevent confiscation of property.

III.

Plaintiffs are the owners of an oil, gas and mineral leasehold estate in a certain 46.13-acre tract situated and located in the Mary Cogswell Survey, Rusk County, Texas, Tom Bean et al being the fee owners. Thereunder Plaintiffs own seven-eighths of the oil, gas and other minerals in place under said land and the right to enter thereon and by mining operations reduce said minerals to physical possession; and Plaintiffs have drilled wells thereon in accordance with the existing rules, regulations and orders of the Railroad Commission, and are now producing oil from said land.

IV.

On or about March 14, 1939, Defendants Hastings and Dodson filed an application with the Railroad Commission of Texas to drill Well No. 2 on their alleged 3.85-acre Jim Dickson lease, Mary Cogswell Survey, Rusk

County, Texas, in exception to Rule 37, and after due notice and hearing, at which Plaintiffs appeared and protested, the Railroad Commission entered an order on July 5, 1939, granting to Defendants Hastings and Dodson a permit to drill said Well No. 2 here involved, to be located 150-feet East of the West line and 130-feet Southwest of Well No. 1. A copy of this order is hereto attached, marked "Exhibit A", and made a part hereof for all purposes, the same as if copied at length here.

7

V.

The order of the Railroad Commission of Texas granting Defendants Hastings and Dodson permit to drill Well No. 2 was arbitrarily and capriciously entered in violation of the Railroad Commission's Rule 37 and was made in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, because of the facts hereinafter shown:

Said alleged 3.85-acre tract now has one producing well thereon and said well is sufficient to enable said Defendants to produce all of the recoverable oil originally or now in place under said tract, and a second well on said tract is not necessary for the prudent development thereof or to prevent drainage of oil from said tract or waste or the confiscation of property within the meaning of Rule 37 or to enable Defendants Hastings and Dodson to recover their proportionate share of the recoverable oil reserves in the field of which said tract forms a part.

Defendants said tract of approximately 3.85-acres is now more densely drilled than the average density of the East Texas field and is more densely drilled than Plaintiffs'

lease or any lease which adjoins said 3.85-acre tract, with the exception of one lease drilled to a density of one well to 3.62-acres, another drilled to one well to 3.75-acres, and a tract of 1.75-acres having only one well on it. If said Well No. 2 is drilled and produced it will give Defendants Hastings and Dodson an advantage over operators of surrounding leases, including Plaintiffs, by reason of the density of drilling, in that said 3.85-acre tract will then be more densely drilled than any adjoining lease excepting the 1.75-acre tract whereon only one well is drilled. By reason of such density of drilling on said 3.85-acre tract and the method of proration enforced by the Railroad Commission in the East Texas field Defendants Hastings and Dodson will be enabled to, and will, drain Plaintiffs' oil from Plaintiffs' said lease. If any disparity in density now exists between Defendants Hastings and Dodson's lease and any adjacent lease thereto, the appropriate and legal method of protecting the rights, if any, of Hastings and Dodson, is by adjustment of allowable and not by granting additional wells to Hastings and Dodson, the production of which will enable Hastings and Dodson to drain oil from Plaintiffs' said lease. The Defendant Railroad Commission has refused to so adjust allowables within the East Texas field and has made an order granting said permit notwithstanding the fact that the drilling of a well thereunder and the production of oil therefrom will enable Defendants Hastings and Dodson to reduce to their possession oil which is the property of Plaintiffs. The Railroad Commission has by persistent policy refused to adjust allowables in such a situation as will be brought about by the drilling of a second well on said 3.85-acre tract, and the only relief which the Commission has offered in such a situation is the granting of permits to drill additional wells. In this instance Plaintiffs now have on their said lease a sufficient number of wells to produce their propor-

tionate share of the oil in said field and the recoverable oil reserves under their lease, and additional wells would not be necessary to so produce their proportionate share and recoverable reserves under their lease, except for the drilling of a second well on said 3.85-acre tract and the production of oil from such well.

9 The method of proration enforced by the Railroad Commission in the East Texas field in practical effect amounts to prorating among the wells in the field, on a per well basis, a daily field allowable fixed for the field by the Railroad Commission. At the time the order granting the permit to drill a second well on said 3.85-acre tract was entered said method of proration was in force, and the application of said method of proration to said 3.83-acre tract and to Plaintiffs' lease will operate to allow a substantially greater production per acre per day from the 3.85-acre tract than will be allowed from Plaintiffs' less densely drilled tract, resulting in drainage of Plaintiffs' lease, and this notwithstanding the fact that Plaintiffs' said lease is as favorably situated on the structure and has as productive sands as the tract of Defendants Hastings and Dodson.

The order of the Railroad Commission granting said permit to drill a second well on said 3.85-acre tract was made in the light of the existing proration orders in force in the East Texas field and the one is a constituent part of the other; and said permit to drill was granted as a part of the general scheme enforced by the Railroad Commission to control the drilling of wells in the East Texas field and production of oil therefrom. Said two orders should be considered together, and the validity of the order granting the permit, determined in consideration of the effect thereof, in view of the method of proration enforced in said field.

The order of the Railroad Commission granting a permit to drill a second well on said 3.85-acre tract operates to deprive Plaintiffs of their property without due process of law and to deny to Plaintiffs the equal protection of the law in violation of the due process clause and the equal protection clause of the Constitution of the United States.

10 The drilling of a second well on said 3.85-acre tract is not necessary to prevent waste of oil or gas; but, on the contrary, the drilling of said well and the production of oil therefrom will reasonably result in the drilling of some three or four offset wells and such concentration of drilling and production will increase the fire hazards existing in the field and will result in waste by reason of damage to the common reservoir, the lowering of pressures, channeling in the oil bearing sands, premature intrusion of water and entrapment of oil in the sands.

VI.

If the proposed Well No. 2 is drilled, Plaintiffs will in all probability be forced to drill additional wells at an expense of approximately ten thousand dollars ($10,000.00) each; which wells would be wholly unnecessary and none would be required except for the drilling of said Well No. 2 and the production of oil therefrom under existing proration orders. The expense of drilling such additional wells will be in the nature of damages to Plaintiffs. That to equalize density Plaintiffs would have to drill approximately fourteen additional wells; that such drilling is wholly unnecessary to the reasonable development of Plaintiffs' lease and would result in waste. The extent of drainage which Plaintiffs will suffer, notwithstanding offsetting of the proposed well, cannot be accurately estimated, and the nature of Plaintiffs' damage is irreparable. And, Plaintiffs have no adequate remedy at law to protect them from suffering such damage.

Wherefore, Plaintiffs pray that the Defendants herein be summoned to appear and answer herein, and that on final hearing hereof, the order of the Railroad Commission permitting Defendants Hastings and Dodson to drill said Well No. 2 be set aside and adjudged to be wholly null and void, and that judgment be rendered perpetually enjoining said Defendants, their agents, servants, 11 employees and assigns, from permitting or prosecuting any drilling operations under said permit and from producing oil or gas from any well drilled, or to be drilled, under said permit; and perpetually enjoining Defendant Railroad Commission of Texas and the members thereof from granting to said Hastings and Dodson, their assigns, or agents, permission to produce oil or gas from said Well No. 2, and from placing said well on the allowable production schedule, and from issuing to Defendants Hastings and Dodson, or their assigns, any certificate of compliance or pipe line certificate, or any character of certificate that will allow production from said well; and that injunction issue herein restraining Defendant Railroad Commission, and the members thereof, their agents, servants and employees, from granting any further permit to said Defendants Hastings and Dodson, or to their assigns, to drill any well on said alleged 3.85-acre tract of land; and Plaintiffs further pray for the issuance of a mandatory injunction to said Hastings and Dodson ordering that said Well No. 2, if drilled, or partially drilled, be plugged and effectually sealed in the manner required by law and in accordance with the rules of the Railroad Commission so as to prevent future production or flow or oil or gas therefrom; and Plaintiffs further pray for such other and further relief, general or special, in law and in equity, as they may be justly entitled to receive.

(S.) E. R. HASTINGS,

Tulsa, Oklahoma.

(S.) DAN MOODY,

Austin, Texas.

Attorneys for Plaintiffs.

12 EXHIBIT A.

State of Texas.

Railroad Commission of Texas,
Austin.

Case No. 16,504.

Rule 37.

= 2 & 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas.

Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property;

Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2 to be spaced as follows:

=2—150 feet east of the west line;
130 feet southwest of well No. 1.

It is Further Ordered that well No. 3 is hereby denied.

Entered at Austin, Texas, on this the 5th day of July, 1939.

LON A. SMITH,
Chairman.

.....,
Commissioner.

JERRY SADLER,
Commissioner.

Attest:
C. F. PETET,
Secretary.

The above and foregoing is a true and correct copy of an order of the Railroad Commission entered on the above date.

.....,
Stanford Payne, Chief Deputy Supervisor Oil and Gas Division.

13 Filed 17th Day of July, 1939.

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14 ANSWER OF DEFENDANTS O. L. HASTINGS AND C. F. DODSON.

(Title Omitted.)

To Said Honorable Court:

First Defense.

The complaint fails to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Hon-

orable Court over the subject matter of the claim alleged in the complaint.

Second Defense.

The complaint fails to state a claim against defendants upon which relief can be granted.

Third Defense.

This suit is prematurely brought and this Honorable Court has no jurisdiction thereof for the reason that the Railroad Commission of Texas has not taken final action upon the application of Hastings and Dodson for a permit to drill well No. 2 on their 3.85 acre tract. The order of the Railroad Commission granting the permit to drill said well No. 2 is dated and was issued on July 5, 1939. At said time there was in effect and there is now in effect the order of the Railroad Commission dated August 30, 1933, and providing as follows, to-wit:

15 "It is Hereby Ordered by the Railroad Commission of Texas that in all orders, judgments, and decrees written by the Railroad Commission of Texas, no motion for a new trial shall be filed or entertained unless it is filed within twenty (20) days after such order, judgment, or decree has been rendered and entered of record. It must be filed in writing and signed by the applicant or by his attorney, specifying the grounds on which it is founded. No ground not specified shall be considered by the Commission."

This suit was filed by plaintiffs on July 17, 1939, within less than twenty days after the entry of said order on July 5, 1939, and before the expiration of the time fixed by the Railroad Commission for the filing of motions for

a new trial or a rehearing on said application. Thereafter, on July 18, 1939, Sinclair-Prairie Oil Company, one of the protestants in said proceeding before the Railroad Commission, and the owner of one of the leases adjacent to the Hastings and Dodson lease, filed with the Railroad Commission a motion for rehearing on said application. Said motion for rehearing was filed with the Railroad Commission of Texas before service of the summons in this cause was made upon any of the defendants. Said motion for rehearing is still pending before the Railroad Commission of Texas and has not been acted upon and there has been no final action by the Railroad Commission with reference to the application of Hastings and Dodson to drill said well No. 2.

Fourth Defense.

I.

Defendants admit that the Railroad Commission of Texas is a department and agency of the government organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and that defendants Lon A. Smith, E. O. Thompson and G. A. Sadler are the duly elected, qualified and acting members of the Railroad Commission of Texas and are citizens of the State of Texas, and each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas.

Defendants deny that the order of the Railroad Commission granting them a permit to drill well No. 2 on their 3.85 acre Dickson tract, Mary Cogswell Survey, Rusk County, Texas, operates to deprive plaintiff of their property without due process of law, and deny that said order is violative of the Fourteenth Amendment to the Constitution of the United States.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph No. I of the complaint.

II.

Defendants admit the allegations contained in paragraph No. II of the complaint with reference to the promulgation of Rule 37 and admit that said rule, as amended on May 29, 1934, was in effect at the time of the issuance of the permit complained of. Defendants further say that on the 13th day of July, 1939, said rule as applied to the East Texas field was amended by order of the Railroad Commission of Texas of said date, and that a true copy of said amendment to said Rule 37 is attached hereto and marked Exhibit "A" and made a part hereof.

III.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph No. III of the complaint.

IV.

Defendants admit the allegations contained in paragraph No. IV of the complaint.

V.

Defendants deny that the order of the Railroad Commission of Texas granting them a permit to drill well No. 2 was arbitrarily or capriciously entered or that same

was in violation of the Railroad Commission's
17 Rule No. 37, and deny that said order was in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

VI.

Defendants say that the well which is permitted to be drilled by the order of the Railroad Commission of Texas upon the 3.85 acre tract owned by them is necessary to prevent drainage of oil from said tract and to prevent waste and to prevent confiscation of property, and is necessary to enable them to recover their proportionate share of the recoverable oil reserves of the field. Defendants say that they are informed and believe that the density of drilling as alleged in paragraph No. V of the complaint with reference to their tract and the surrounding tracts is correct. Defendants deny that by the drilling of a second well on their 3.85 acre tract they will be enable to drain oil from plaintiffs' lease. Defendants deny that the appropriate and legal method of protecting the rights of Hastings and Dodson is by adjustment of allowables and say that the appropriate and legal method of protecting said rights was adopted by the Railroad Commission in granting a permit to drill said well No. 2 to Hastings and Dodson. Defendants deny that there has been any application made to the Railroad Commission of Texas by plaintiffs or by the defendants Hastings and Dodson to make an adjustment of the allowables in connection with their properties and deny that the Railroad Commission has refused to make any adjustment of allowables in connection with said properties. The defendants Hastings and Dodson applied to the Railroad Commission of Texas for relief by being permitted to drill an additional well on their 3.85 acre tract, which relief was

granted to said defendants by the Railroad Commission of Texas. The plaintiffs have not applied to the Railroad Commission of Texas for relief either by the granting of additional wells on their tract or by the adjust-
18 ment of the allowables on the wells which plaintiffs have already drilled upon their said tract In this connection defendants say that plaintiffs have failed to exhaust their remedy before the Railroad Commission in that they have failed to apply to the Railroad Commission of Texas for relief either on the basis of an adjustment of allowables or on the basis of being permitted to drill additional wells upon their tract. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the plaintiffs' allegation that they now have on their said lease a sufficient number of wells to produce their proportionate share of the oil in said field and the recoverable oil reserves under their lease. Defendants deny that the method of proration enforced by the Railroad Commission of Texas amounts to a per well proration among the wells in the East Texas field. Defendants admit that the spacing orders of the Railroad Commission should be considered and construed together and that they form one method of regulating the production of oil from the East Texas field. Defendants deny that the order of the Railroad Commission granting a permit to drill a second well on the Hastings and Dodson 3.85 acre tract operates to deprive plaintiffs of their property without due process of law or to deny to plaintiffs the equal protection of the law in violation of the due process clause or the equal protection clause of the Constitution of the United States. Defendants say that the drilling of a second well on said 3.85 acre tract was necessary to prevent the waste of oil and gas as well as to prevent the confiscation of property and deny the allegations contained in paragraph No. V of the complaint, wherein it is alleged that said well was not necessary to prevent waste.

19 VII.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that if the Hastings and Dodson well No. 2 is drilled plaintiffs will be forced to drill additional wells at an expense of approximately $10,000. each. Defendants say that if plaintiffs consider the drilling of additional wells to be necessary to the protection of their property, or if said wells are necessary to prevent waste, the Railroad Commission will give due consideration to the advisability of granting additional wells to plaintiffs. In the event that the Railroad Commission grants to plaintiffs permits to drill additional wells plaintiffs will not be forced to drill said wells, but plaintiffs will be given the option of drilling said wells if they wish to do so in order to prevent waste or to prevent the confiscation of their property. Defendants deny that the expense of drilling any additional wells upon the plaintiffs' lease will be in the nature of legal damages. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that to equalize density plaintiffs would have to drill approximately fourteen additional wells on their lease, and defendants further say that they do not have knowledge or information sufficient to form a belief as to the truth of the allegations that the drilling of such wells will be wholly unnecessary in the reasonable development of plaintiffs' lease and that said drilling would result in waste. Defendants deny that the damages, if any, suffered by the plaintiffs are irreparable and further deny that plaintiffs have no adequate remedy at law.

Wherefore, defendants pray that they go hence with their costs without day and for such other and further relief as they may be entitled to receive.

(S.) J. A. STOREY,
Attorney for O. L. Hastings and C. F. Dodson.

Address: Vernon, Texas.

Service of the foregoing Answer by delivery of copy thereof to the undersigned is acknowledged, this the third day of August, 1939.

(S.) DAN MOODY.

20

EXHIBIT "A."

Railroad Commission of Texas,
Oil and Gas Division.

Oil and Gas Docket No. 120.

= 6-795

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field.

Austin, Texas, July 13, 1939.

Pursuant to previous notice and hearing in the adoption and amendment of rules and regulations by the Railroad Commission of Texas governing the conservation of crude oil and natural gas and the prevention of waste thereof, and in the light of the evidence introduced at various hearings held by the Commission and particularly the hearing held in the City of Austin, June 12, 1939, and in accordance with the findings of the Railroad Commission in its orders of August 26, 1935, September 3, 1937, and

October 8, 1937, that the closer wells are drilled the greater will be the recovery from the area so drilled, and in view of certain allegations contained in the written petitions recently filed with the Commission by various owners of oil and gas leases in the East Texas Field;

It is Hereby Ordered by the Railroad Commission of Texas that Rule No. 1 of Sub-Division II (Drilling) of Division 3, being special rules governing the East Texas Field, is hereby amended so that the same shall hereafter read as follows:

Rule 1. Spacing Rule. No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling wells on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equalling four hundred (400) feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that the facts therein stated are within the knowledge of the affiant true, and

that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten (10) day's notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation.

Provided Further that the Railroad Commission of Texas, in order to prevent waste or to prevent the confiscation of property, may upon its own motion or order, issue or grant a permit or permits for the drilling of any well or wells for oil or gas nearer than 660 feet to any other completed or drilling well on the same or
21 adjacent tract of land or farm and nearer than 330 feet to any property line, lease line or subdivision line as hereinbefore prescribed whenever the Commission shall determine that the drilling of any such well or wells is necessary to prevent waste or to prevent the confiscation of property. When in the opinion or judgment of the Commission waste or confiscation of property is reasonably eminent or is taking place on any leasehold, the Commission may, on its own intitiative or motion, order a hearing for the purpose of determining whether such waste or confiscation of property is taking place. Such permit or permits shall be issued or granted only after at least ten (10) day's notice to the owners of said leasehold and to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that the drilling of any well or wells for oil or gas is necessary either to prevent waste or to protect the owners of said leasehold from confiscation.

No well drilled in violation of this rule without special permit obtained issued or granted in the manner prescribed in said rule, and no well drilled under such a special permit or on the Commission's own order which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule or on the Commission's own order shall be plugged.

The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas Field to the extent of such conflict.

In the adoption and promulgation of this order, it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph separately and independently of each other such phrase, sentence, and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion.

RAILROAD COMMISSION OF TEXAS,

(Seal) LON A. SMITH, Chairman.

JERRY SADLER, Commissioner.

Attest:

C. F. PETET, Secretary.

Filed 3rd day of August, 1939.

ANSWER OF DEFENDANT RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON AND G. A. SADLER.

22 Filed August 4, 1939.

(Title Omitted.)

To Said Honorable Court:

First Defense.

The complaint fails to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter of the claim alleged in the complaint.

Second Defense.

The complaint fails to state a claim against defendants upon which relief can be granted.

Third Defense.

This suit is prematurely brought and this Honorable Court has no jurisdiction thereof for the reason that the Railroad Commission of Texas has not taken final action upon the application of Hastings and Dodson for a permit to drill well No. 2 on their 3.85 acre tract. The order of the Railroad Commission granting the permit to drill said well No. 2 is dated and was issued on July 5, 1939. At said time there was in effect and there is now in effect the order of the Railroad Commission dated August 30, 1933, and providing as follows, to-wit:

23 "It is Hereby Ordered by the Railroad Commission of Texas that in all orders, judgments,

and decrees written by the Railroad Commission of Texas, no motion for a new trial shall be filed or entertained unless it is filed within twenty (20) days after such order, judgment, or decree has been rendered and entered of record. It must be filed in writing and signed by the applicant or by his attorney, specifying the grounds on which it is founded. No ground not specified shall be considered by the Commission."

This suit was filed by plaintiffs on July 17, 1939, within less than twenty days after the entry of said order on July 5, 1939, and before the expiration of the time fixed by the Railroad Commission for the filing of motions for a new trial or a rehearing on said application. Thereafter, on July 18, 1939, Sinclair-Prairie Oil Company, one of the protestants in said proceeding before the Railroad Commission, and the owner of one of the leases adjacent to the Hastings and Dodson lease, filed with the Railroad Commission a motion for rehearing on said application. Said motion for rehearing was filed with the Railroad Commission of Texas before service of the summons in this cause was made upon any of the defendants. Said motion for rehearing is still pending before the Railroad Commission of Texas and has not been acted upon and there has been no final action by the Railroad Commission with reference to the application of Hastings and Dodson to drill said well No. 2.

Fourth Defense.

I.

Defendants admit that the Railroad Commission of Texas is a department and agency of the government organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and

that defendants Lon A. Smith, E. O. Thompson and G. A. Sadler are the duly elected, qualified and acting members of the Railroad Commission of Texas and are citizens of the State of Texas, and each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas.

Defendants deny that the order of the Railroad Commission granting to defendants Hastings and Dodson a permit to drill well No. 2 on their 3.85 acre Dickson tract, Mary Cogswell Survey, Rusk County, Texas, operates to deprive plaintiff of their property without due process of law, and deny that said order is violative of the Fourteenth Amendment to the Constitution of the United States.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph No. I of the complaint.

II.

Defendants admit the allegations contained in paragraph No. II of the complaint with reference to the promulgation of Rule 37 and admit that said rule, as amended on May 29, 1934, was in effect at the time of the issuance of the permit complained of. Defendants further say that on the 13th day of July, 1939, said rule as applied to the East Texas field was amended by order of the Railroad Commission of Texas of said date, and that a true copy of said amendment to said Rule 37 is attached hereto and marked Exhibit "A" and made a part hereof.

III.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the

allegations contained in paragraph No. III of the complaint.

IV.

Defendants admit the allegations contained in paragraph No. IV of the complaint.

V.

Defendants deny that the order of the Railroad Commission of Texas granting to defendants Hastings and Dodson a permit to drill well No. 2 was abritrarily or capriciously entered or that same was in violation of the Railroad Commission's Rule No. 37, and deny that said order was in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

VI.

Defendants say that the well which is permitted to be drilled by the order of the Railroad Commission of Texas upon the 3.85 acre tract of the defendants Hastings and Dodson is necessary to prevent drainage of oil from said tract and to prevent waste and to prevent confiscation of property, and is necessary to enable the defendants Hastings and Dodson to recover their proportionate share of the recoverable oil reserves of the field. Defendants say that they are informed and believe that the density of drilling as alleged in paragraph No. V of the complaint with reference to the Hastings and Dodson tract and the surrounding tracts is correct. Defendants deny that by the drilling of a second well on their 3.85 acre tract defendants Hastings and Dodson will be enabled to drain oil

from plaintiffs' lease. Defendants deny that the appropriate and legal method of protecting the rights of Hastings and Dodson is by adjustment of allowables and say that the appropriate and legal method of protecting said rights was adopted by the Railroad Commission in granting a permit to drill said well No. 2 to Hastings and Dodson. Defendants deny that there has been any application made to the Railroad Commission of Texas by plaintiffs or by the defendants Hastings and Dodson to make an adjustment of the allowables in connection with their properties and deny that the Railroad Commission has refused to make any adjustment of allowables in connection with said properties. The defendants Hastings and Dodson applied to the Railroad Commission of Texas for relief by being permitted to drill an additional
26 well on their 3.85 acre tract, which relief was granted to said defendants by the Railroad Commission of Texas. The plaintiffs have not applied to the Railroad Commission of Texas for any relief either by the granting of additional wells on their tract or by the adjustment of the allowables on the wells which plaintiffs have already drilled upon their said tract. In this connection defendants say that plaintiffs have failed to exhaust their remedy before the Railroad Commission in that they have failed to apply to the Railroad Commission of Texas for relief either on the basis of an adjustment of allowables or on the basis of being permitted to drill additional wells upon their tract. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the plaintiffs' allegation that they now have on their said lease a sufficient number of wells to produce their proportionate share of the oil in said field and the recoverable oil reserves under their lease. Defendants deny that the method of proration enforced by the Railroad Commission of Texas amounts to a per well proration among the wells in the East Texas

field. Defendants admit that the spacing orders of the Railroad Commission should be considered and construed together and that they form one method of regulating the production of oil from the East Texas field. Defendants deny that the order of the Railroad Commission granting a permit to drill a second well on the Hastings and Dodson 3.85 acre tract operates to deprive plaintiffs of their property without due process of law or to deny to plaintiffs the equal protection of the law in violation of the due process clause or the equal protection clause of the Constitution of the United States. Defendants say that the drilling of a second well on said 3.85 acre tract was necessary to prevent the waste of oil and gas as well as to prevent the confiscation of property and deny the allegations contained in paragraph No. V of the complaint, wherein it is alleged that said well was not necessary to prevent waste.

VII.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that if the Hastings and Dodson well No. 2 is drilled plaintiffs will be forced to drill additional wells at an expense of approximately $10,000. each. Defendants say that if plaintiffs consider the drilling of additional wells to be necessary to the protection of their property, or if said wells are necessary to prevent waste, the Railroad Commission will give due consideration to the advisability of granting additional wells to plaintiffs. In the event that the Railroad Commission grants to plaintiffs permits to drill additional wells plaintiffs will not be forced to drill said wells, but plaintiffs will be given the option of drilling said wells if they wish to do so in order to prevent waste or to prevent the confiscation of their property. Defendants deny that the expense of drilling

any additional wells upon the plaintiffs' lease will be in the nature of legal damages. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that to equalize density plaintiffs would have to drill approximately fourteen additional wells on their lease, and defendants further say that they do not have knowledge or information sufficient to form a belief as to the truth of the allegations that the drilling of such wells will be wholly unnecessary in the reasonable development of plaintiffs' lease and that said drilling would result in waste. Defendants deny that the damages, if any, suffered by the plaintiffs are irreparable and further deny that plaintiffs
28 have no adequate remedy at law.

Wherefore, defendants pray that they go hence with their costs without day and for such other and further relief as they may be entitled to receive.

(S.) GERALD C. MANN,
Attorney General of Texas.
(S.) JAMES P. HART,
Assistant Attorney General.

Address: State Capitol,
Austin, Texas.

(S.) EDGAR CALE,
Assistant Attorney General,
Attorneys for Defendants.

Acknowledgment of Service.

Service of the foregoing answer by delivery of a copy thereof to the undersigned is acknowledged this 4th day of August, 1939.

(S.) DAN MOODY,
Attorney for Plaintiffs, Selby Oil & Gas Company and Lewis Production Company.

29 EXHIBIT "A"—Order of Railroad Commission of Texas, Oil & Gas Division, dated 7/13/39, omitted from the printed record, being heretofore copied at page 20.

* * * * * * * * * *

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON AND G. A. SADLER.

31 (Title Omitted.)

To said Honorable Court:

Come now the defendants the Railroad Commission of Texas, and Lon A. Smith, E. O. Thompson and G. A. Sadler, Members of the Railroad Commission of Texas, and, by written consent of the plaintiffs, first had and obtained, file this amendment to their answers, as follows:

I.

Amend Paragraph I under Fourth Defense by striking out the last sentence in said paragraph and substituting therefor the following:

Defendants specially deny that the amount in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00). Defendants admit the allegations in Paragraph I (a) of the complaint with reference to the citizenship and residence of the defendants O. L. Hastings and C. F. Dodson. Defend-

ants deny the remaining allegations in Paragraph I of the complaint.

(S.) GERALD C. MANN,
32 Attorney General of Texas.

(S.) JAMES P. HART,
Assistant Attorney General.

(S.) E. R. SIMMONS,
Assistant Attorney General.

(S.) EDGAR CALE,
Assistant Attorney General, Attorneys for Defendants, The Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler.

Austin, Texas.

Consent and Acknowledgement of Service.

Consent to the filing of the foregoing amendment to the answer of the defendants, the Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler, is hereby given, and service of a copy of said supplemental answer is acknowledged this 10th day of June, 1940.

(S.) DAN MOODY,
Attorney for Plaintiffs, Selby Oil & Gas Company and Lewis Production Company.

Filed: 10th day of June, 1940.

MOTION OF DEFENDANTS, O. L. HASTINGS AND C. F. DODSON TO DISMISS FOR WANT OF JURISDICTION.

33 (Title Omitted.)

To Said Honorable Court:

Come now O. L. Hastings and C. F. Dodson, defendants in the above styled and numbered cause, and move the Court to dismiss Plaintiffs' Complaint for want of jurisdiction, and as grounds therefor say:

This suit is instituted by plaintiffs (pursuant to Article 6049c, Section 8, Vernon's Annotated Texas Civil Statutes, 1925, as amended) as an attack upon an order of the Railroad Commission granting to these defendants a permit to drill their No. 2 well on a 3.85 acre tract of land in the Mary Coggswell Survey, Rusk County, Texas.

I.

Plaintiff predicate jurisdiction of this Court on (1) diversity of citizenship, (2) an amount involved in excess of $3,000.00 exclusive of interest, and (3) the complaint that the order under attack deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the
34 United States.

II.

Notwithstanding the requisite diversity of citizenship (which is conceded) and although in the prefatory paragraph it is claimed that the amount involved is in excess of $3,000.00 exclusive of interest, it is made to appear from Paragraph VI of the complaint that plaintiffs' allega-

tion of damages is based on the mere "probability" that they may "be forced to drill additional wells" if these defendants drill the well permitted, and upon the claim that in order to "equalize density Plaintiffs would have to drill approximately fourteen additional wells". Said averments constitute all the allegations in respect to the amount involved, and show upon their face that they are speculative, conjectural, are not presently sustained, and will not be sustained unless the "probability" at some undetermined and future time materializes.

The next and only other ground upon which jurisdiction is predicated is that the order of the Railroad Commission granting these defendants the permit to drill their No. 2 Well upon said tract of land operates to deprive plaintiffs of their property without due process of law. The basis for this averment, as apparent upon the face of the complaint, is that:

1. Defendants' one well now on the said tract is sufficient to enable them to produce all recoverable oil originally or now in place thereunder, without necessity for a second well to prevent waste or confiscation of defendants' property;

2. Defendants' tract is more densely drilled than the average density of the East Texas field, and is more densely drilled than plaintiffs' lease or any lease adjoining defendants' tract, with the exception of three designated adjoining leases;

35 3. Defendants' second well would give them an advantage over plaintiffs and other surrounding operators by reason of the increased density, and defendants will be thereby enabled to drain some oil from plaintiffs' lease;

4. The best method of defendants protecting their rights would be by a readjustment of allowables on their well and not the drilling of an additional well. In this connection it is admitted that the Railroad Commission would not grant defendants relief by readjusting the allowable, but grants relief only by permitting, as here, an additional well;

5. The method of proration adopted and enforced by the Commission amounts, in practical effect, to prorating the field on a per well basis, and that the permit granted will operate to allow greater production per acre per day from defendants' tract than will be allowed to be produced from plaintiffs' tract; ,

6. The allowable or proration order of the Commission then in effect and the permit order here under attack should be construed as constituent parts, each of the other. A second well on defendants' tract is not necessary to prevent waste, but "will reasonably result in the drilling of some three or four offset wells and such concentration of drilling and production will increase the fire hazard existing in the field and will result in waste by reason of damage to the common reservoir";

7. If defendants' No. 2 Well is drilled, plaintiffs will "in all probability be forced to drill additional" and unnecessary wells;

36 8. To equalize density, plaintiffs would have to drill approximately fourteen additional and unnecessary wells; and

9. The extent of drainage which plaintiffs will suffer cannot be accurately estimated.

From the foregoing allegations, it is apparent that plaintiffs wholly failed to allege with that certainty required the amount of damages, if any, which plaintiffs would sustain should defendants drill their No. 2 Well. It is also made to appear that the same is but an attempt to have this Court substitute their conception of the fairness and reasonableness of the permit order for the means and methods adopted by the Commission to grant defendants the relief they claimed and have been awarded. Although the Commission might have adopted a fairer method of adjusting the rights of the parties hereto, the method adopted is not in contravention and violative of the due process clause of the Federal Constitution.

Wherefore, premises considered, these defendants pray judgment of the Court that the complainant be dismissed for want of jurisdiction, and for general relief.

(S.) LEE & PORTER,
Attorneys for Defendants, O. L. Hastings and C. F. Dodson.

Service Address:
501 Glover-Crim Bldg.,
Longview, Texas.

Filed: 11th day of June, 1940.

MOTION OF DEFENDANTS O. L. HASTINGS AND C. F. DODSON TO DISMISS FOR WANT OF EQUITY AND SUBJECT THERETO THEIR FIRST AMENDED ANSWER

37 (Title Omitted.)

To Said Honorable Court:

Plaintiffs having filed an amendment to complaint, now come O. L. Hastings and C. F. Dodson and, subject to

their motion to dismiss for want of jurisdiction, and with leave of the Court first obtained, file this their motion to dismiss, and as grounds therefor say:

I.

The complaint fails to state a claim against these defendants upon which relief can be granted.

II.

This suit is prematurely brought and this Court has no jurisdiction thereof for the reason that the Railroad Commission had not taken final action upon the application of Hastings and Dodson for a permit to drill their No. 2 well at the time this suit was filed. The order of the Railroad Commission granting permission to drill said well No. 2 was issued July 5, 1939. At said time, there was in effect and there is now in effect an order of the Railroad Commission dated August 30, 1933, providing as follows, to-wit:

"It is Hereby Ordered by the Railroad Commission of Texas that in all orders, judgments and decrees
38 written by the Railroad Commission of Texas, no motion for a new trial shall be filed or entertained unless it is filed within twenty (20) days after such order, judgment, or decree has been rendered and entered of record. It must be filed in writing and signed by the applicant or by his attorney, specifying the grounds on which it is founded. No ground not specified shall be considered by the Commission."

This suit was filed by plaintiffs on July 17, 1939, within less than twenty days after the entry of said order on July 5, 1939, and before the expiration of the time fixed

by the Railroad Commission for the filing of motions for a new trial or a rehearing on said application and order. Thereafter, on July 18, 1939, Sinclair-Prairie Oil Company, one of the protestants in said proceeding before the Railroad Commission, and the owner of an oil and gas lease adjacent to the Hastings and Dodson lease, filed with the Railroad Commission a motion for rehearing on said application and order. Said motion for rehearing was filed with said Commission before service of the summons in this cause was made upon any of the defendants. Said motion for rehearing is still pending before said Commission and has not been acted upon and there has been no final action by said Commission with reference to the application of Hastings and Dodson to drill said Well No. 2, and the order granting permit therefor.

III.

Plaintiffs now here allege that they have been prevented by an order of said Commission from drilling sufficient wells on their property to develop their tract on the average acreage density of the tract herein involved, and by reason of same said petition is insufficient to admit of sufficient evidence to overcome the presumption of validity accorded the order under attack.

IV.

Plaintiffs do not allege that the boundaries of their lease and leasehold estate adjoin or are contiguous to the boundaries of the lease and leasehold estate of
39 these defendants, and by reason of same do not show themselves to be an interested party and affected by the order of the Commission under attack.

V.

Plaintiffs allege in substance that any disparity in density existing between its lease and that of these defendants

should be adjusted by a readjustment of allowable on defendants' well already drilled. Such allegations constitute a collateral attack upon the allowable or proration schedules promulgated by said Commission. In connection with such allegations it is alleged that the persistent and fixed policy of the Commission is not to adjust allowables, but to grant a permit or permits to drill an additional well or wells, and in this connection it is not shown that the determination by the Commission that another well should be permitted these defendants on their tract was beyond their jurisdiction, and its findings that such well was necessary to prevent confiscation of property rights is peculiarly within the power of the Commission and this Court cannot substitute its findings or judgment therefor.

VI.

The complaint and amendment thereto show on their face that notice was given and hearing had, and that the Commission found that no injustice would be done by the granting of said permit as an exception to Rule 37, and that same should be granted to prevent confiscation of property. There is no allegation negativing the existence of facts upon which such finding was based. Since the Railroad Commission is vested by law with power to make findings in connection with application for permits as exceptions to Rule 37, its conclusions are binding if there are facts and evidence supporting such conclusions. This Court would be authorized to overturn same only in the event of absence of facts to support the conclusion reached by the Commission, and plaintiffs' complaint and amendment thereto wholly fail to negative the existence of any such facts, and they must therefore be
40 presumed in favor of the order under attack.

VII.

Plaintiffs allege in substance that their damage would be occasioned by the "reasonable probability" that they would be forced to drill additional offset wells at an approximate cost of $10,000 per well; that the drilling by defendants of their No. 2 well would result in drainage from plaintiffs' lease in an amount exceeding five thousand barrels of oil. The complaint and amendment thereto wholly fail to negative the presumption that said well or wells so drilled by them would be economically profitable.

VIII.

As is apparent upon the face of the complaint and amendment to complaint, the gravamen thereof is that plaintiffs seek to substitute by Court decree for the relief already granted these defendants an adjustment of allowables; thereby supplanting the Commission's judgment and decision thereon.

Wherefore, premises considered, these defendants pray that their motion to dismiss for want of equity be sustained; and that the complaint and amendment thereto be dismissed at plaintiffs' cost.

Subject to their motion to dismiss for want of jurisdiction and the foregoing motion to dismiss for want of equity, these defendants make and file this, their first amended answer and reply to plaintiffs' complaint and amendment thereto, and therefor say:

I.

These defendants admit the allegations in Paragraphs I, II, III and IV of the complaint and amendment thereto.

save and except those in Paragraph I (b), I (c) and the allegation in Paragraph III that plaintiffs have drilled wells on their tract in accordance with the existing rules, regulations and orders of the Commission. The allegations of Paragraphs I (b) and I (c) are denied.

As to the allegation that plaintiffs have drilled wells on their tract in accordance with existing rules, regulations and orders of the Commission, these defendants have no knowledge and therefore neither admit nor deny.

II.

These defendants admit that the Railroad Commission has consistently refused to adjust allowables in order to adjust any disparity in density existing between adjacent leases, and has consistently refused to readjust allowables on the basis of acre feet of saturated sand, and admit that the Commission, in order to adjust any disparity existing between adjacent leases, has done so by granting applicants a permit or permits for an additional well or wells. All other allegations of Paragraph V are denied.

III.

These defendants deny all the allegations of Paragraph VI of the amendment to complaint.

IV.

Further answering, if necessary, these defendants say that their said well No. 2 is necessary to prevent drainage of oil from their land and to prevent confiscation of their property and it is necessary to enable them to recover their proportionate share of recoverable oil reserves now

in place under the land covered by their lease. In this connection defendants say that plaintiffs have not applied to the Railroad Commission for relief by the granting of a permit or permits for an additional well or wells on their tract; nor have they applied to said Commission for an adjustment of the allowables on their wells already drilled upin the land covered by their lease, and by reason thereof have failed to exhaust their remedy be-
42 fore said Commission before applying to this Court for relief. They have therefore failed to show that they are without adequate remedy at law, but to the contrary, these defendants say that plaintiffs do have an adequate remedy in that they may apply to said Commission as a matter of right for a permit or permits to drill additional wells, or for a readjustment of allowables on their said wells.

V.

These defendants further say that should plaintiffs drill an additional well or wells upon their lease that same will be economically profitable, and in so doing plaintiffs will not sustain any damage but will prevent the damages complained of.

Wherefore, having fully answered, these defendants pray judgment of the Court that complaint and amendment thereto be dismissed at plaintiffs' cost, and for such other relief at law or in equity to which they may show themselves justly entitled.

(S.) LEE & PORTER,
Attorneys for Defendants.
O. L. Hastings and C. F. Dodson.

Service Address:
501 Glover-Crimm Building,
Longview, Texas.

Certificate.

I, W. Edward Lee, one of the attorneys for defendants, O. L. Hastings and C. F. Dodson, do hereby certify that I have, on this the 13th day of June, 1940, delivered a copy of the foregoing motion and answer to plaintiffs' attorney, the Honorable Dan Moody, and have delivered a copy thereof to Mr. James F. Hart, attorney for the Railroad Commission of Texas.

(S.) W. EDWARD LEE,
Attorney for O. L. Hastings and C. F. Dodson, Defendants.

43 Filed 13th day of June, 1940.

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON AND G. A. SADLER.

44 (Title Omitted.)

To Said Honorable Court:

Come now the defendants, the Railroad Commission of Texas, and Lon A. Smith, E. O. Thompson and G. A. Sadler, Members of the Railroad Commission of Texas, and by leave of Court first had and obtained, file this amendment to their answer in reply to the amendment to plaintiffs' complaint filed on the 13th day of June, 1940, and amend their answer as follows:

I.

Amend the First Defense by striking out the allegations now contained in said paragraph and substituting therefor the following:

The complaint fails to state a claim over which this Honorable Court has jurisdiction, because (1) It appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter of the claim alleged in the complaint, and (2) The complaint does not contain sufficient allegations showing that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00.)

45 II.

Amend Paragraph I under Fourth Defense by striking out the last sentence in defendants' original answer and substituting therefor the following:

Defendants specially deny that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00). Defendants admit the allegations contained in Paragraph I (a) of the complaint with reference to the citizenship and residence of the defendants O. L. Hastings and C. F. Dodson, and the allegations with reference to the residence of the plaintiffs. Defendants deny the remaining allegations in Paragraph I of the complaint.

III.

Amend Paragraph VII under Fourth Defense by adding thereto the following:

Defendants deny that the plaintiffs will suffer drainage by reason of the drilling and production of the Hastings and Dodson well No. 2, and defendants specially deny that the drainage, if any, will be uncompensated drainage, and defendants further specially deny that such drainage, if any, will equal or exceed in amount five thousand barrels of oil, and defendants further specially deny that the dam-

age or injury to the plaintiffs by reason of such drainage, if any, will equal or exceed the sum or value of Three Thousand Dollars ($3000.00).

Wherefore, defendants pray that the foregoing amendments be considered a part of their answer to the complaint, as amended by the plaintiffs as aforesaid, and that upon a hearing this action be dismissed, that defendants go hence with their costs without day, and for such other and further relief, general and special, in law and in equity, as defendants may be justly entitled to receive.

(S.) GERALD C. MANN,
46 Attorney General of Texas.
(S.) JAMES P. HART,
Assistant Attorney General.
(S.) E. R. SIMMONS,
Assistant Attorney General.
(S.) EDGAR CALE,
Assistant Attorney General.
Attorneys for Defendants, Railroad Commission of Texas, Lon A. Smith, E. O. Thompson, and G. A. Sadler.

Austin, Texas.

Filed June 13th, 1940.

AMENDMENT TO PETITION OF PLAINTIFFS SELBY OIL AND GAS COMPANY AND LEWIS PRODUCTION COMPANY.

47 (Title Omitted.)

To the Honorable R. J. McMillan, Judge of Said Court:

Come now the Plaintiffs, Selby Oil & Gas Company and Lewis Production Company, and with consent of the Court

first had and obtained, file this amendment to their original petition, as follows:

I.

Amend Paragraph I(b) to read as follows: The value of the property involved in this suit exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interests and costs, as is more fully shown by facts hereinafter more specifically alleged.

II.

Amend the first sentence of Paragraph III to read as follows: Plaintiffs own jointly, that is, as tenants in common, the oil, gas and mineral leasehold estate in a certain 42.38-acre tract of land in the Mary Cogswell Survey, in Rusk County, Texas, of which estate Tom Bean and Roxie Bean are the grantors, and which lease is known as the Selby Oil & Gas Company and Lewis Production Company Tom Bean 42-acre lease, the lease under which Plaintiffs hold being recorded in Volume 134, page
48 319, of the Deed Records of Rusk County, Texas.

III.

Amend Paragraph VI to read as follows: If the proposed Well No. 2 is drilled and produced by the Defendants Hastings and Dodson, Plaintiffs will, in all reasonable probability, be forced to drill additional offset wells in an attempt to reduce the drainage from Plaintiffs' lease caused by the drilling of the proposed Well No. 2 and the production of oil therefrom. That the expense to Plaintiffs of drilling such additional wells will be approximately Ten Thousand Dollars ($10,000.00) per well; that Plaintiffs now have a sufficient number of wells on their

lease to produce all of the recoverable oil hereunder under reasonable drilling and production regulations, and would not be required to drill any additional wells on their said lease in order to produce the oil thereunder except that the proposed well be drilled and produced, and the drilling of said additional wells to prevent the drainage resulting from the drilling and production of Well No. 2 would be wholly unnecessary except for the drilling and production of said Well No. 2; that even under the existing proration orders Plaintiffs could recover from wells now drilled on their lease the recoverable oil under said lease, except for the drilling of Well No. 2 and the production of oil therefrom; that the expense of drilling such additional wells will be in the nature of damages to the Plaintiffs; that under the existing plan and order of proration enforced by the Railroad Commission, if said Well No. 2 is drilled and produced, the only manner in which the Plaintiffs could then produce oil on the same basis as Defendants Hastings and Dodson would be allowed to produce oil from their lease, would be through the Plaintiffs equalizing the drilling density on their lease by drilling approximately eleven additional wells; that the drilling of such wells, or any additional wells, would be wholly unnecessary to enable Plaintiffs to recover
49 their share of the oil and gas, except for the drilling and production of the proposed Well No. 2. The extent of the drainage which Plaintiffs will suffer from the drilling of the proposed Well No. 2 and the production of oil therefrom cannot be accurately estimated, but Plaintiffs allege that through the drilling of said well and the production of oil therefrom oil will be drained from Plaintiffs' lease in an amount exceeding 5,000 barrels, of the market value of $1.00 per barrel; that the nature of Plaintiffs' damages is irreparable, and Plaintiffs have no adequate remedy at law to protect them from such damages; that Plaintiffs can only be protected from the in-

juries herein alleged by this Court granting the injunctive relief herein prayed for.

Wherefore, Plaintiffs pray as they have heretofore praved in their original petiton.

(S.) E. R. HASTINGS,
(S.) DAN MOODY,
Attorneys for Plaintiffs.

Filed: June 13th, 1940.

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50 ORDER OF THE COURT SUSPENDING TRIAL FOR THE PURPOSE OF LETTING RAILROAD COMMISSION TAKE FURTHER ACTION.

(Title Omitted.)

The above entitled and numbered cause was reached and called for trial on this the 12th day of June, 1940; whereupon came on for hearing the plea in abatement of the Defendants, in connection with which it was made known to the Court that on July 18, 1939, after the filing of this suit on July 17, 1939, Sinclair-Prairie Oil Company filed with the Railroad Commission of Texas a motion for rehearing praying for a review by the Railroad Commission of Texas of the order attacked in this case, and that the Railroad Commission had taken no action on said motion for rehearing; the Court being of the opinion that further proceedings in this case should be suspended and the case passed to allow the Railroad Commission to take action on said pending motion for rehearing;

It is Therefore Ordered by the Court that further proceedings in this trial be suspended, and that the case be

passed for the purpose of allowing the Railroad Commission to act upon said pending motion for rehearing. The Defendants excepted in open Court to this order.

The Clerk is directed to enter in the minutes this order.

51 Made at Austin, Texas, this the 14th day of June, 1940.

(S.) ROBERT J. McMILLAN,
Judge.

Entered: Civ. O. B., Vol. 1, page 122.

Filed: June 14, 1940.

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52 JUDGMENT.

In the United States District Court for the Western District of Texas, Austin Division.

Selby Oil & Gas Company and Lewis Production Company.

vs. No. 27-C. A.

Railroad Commission of Texas, Lon A. Smith, E. O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson.

This cause came on to be heard before the Court on the 18th day of July, 1940, by agreement of all parties at San Antonio, Texas, and the Court thereupon heard evidence offered by the plaintiffs; and at the conclusion of such evidence the defendants O. L. Hastings and C. F. Dodson, in open Court, moved the Court to enter judgment in favor of the defendants; and the Court being of the opinion that the motion of said defendants is well taken and that the

plaintiffs have failed to introduce sufficient evidence to justify the Court in granting the relief prayed for against the order of the Railroad Commission of Texas complained of herein.

It is Therefore Ordered, Adjudged and Decreed by the Court that the plaintiffs Selby Oil & Gas Company and Lewis Production Company, take nothing by their suit, that all relief prayed for by said plaintiffs be denied, and that the defendants Railroad Commission of Texas, Lon A. Smith, E. O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson have and recover of and from the plaintiffs Selby Oil & Gas Company and Lewis Production Company their costs.

Done at San Antonio, Texas, this 18th day of July, 1940.

(S.) ROBERT J. McMILLAN,
Judge.

O. K. as to form:
W. EDWARD LEE.
DAN MOODY.
JAMES P. HART.

Entered: Civ. O. B., Vol. 1, page 132.

53 Filed July 18, 1940.

54 NOTICE OF APPEAL.

In the District Court of the United States for the Western District of Texas, Austin Division.

Selby Oil & Gas Company and Lewis Production Company, Plaintiffs,

vs. Civil Action No. 27.

Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, Defendants.

Notice is hereby given that Selby Oil & Gas Company and Lewis Production Company, Plaintiffs in the above entitled and numbered cause, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on July 18, 1940.

E. R. HASTINGS,

Tulsa, Oklahoma.

DAN MOODY,

Austin, Texas.

By DAN MOODY,

Attorneys for Appellants Selby Oil & Gas Company and Lewis Production Company.

Acknowledgment of Service.

The Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, acting by and through their attorneys of record, acknowledge receipt this day of a copy of Appellants' Notice of Appeal to the United States Circuit Court of Appeals for the Fifth Circuit; and the said Appellees, Railroad Commission of Texas, Lon A. Smith, Ernest O.

Thompson, G. A. Sadler, O. L. Hastings and C. F.
55 Dodson, by and through their attorneys of record, hereby waive all service of notice or citation, this the 12th day of October, 1940.

GERALD C. MANN,
Attorney General of Texas,
By JAMES P. HART,
Attorney for Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler.
W. EDWARD LEE,
Attorney for O. L. Hastings and C. F. Dodson.

Filed: 14th day of October, 1940.

MOTION FOR ORDER DIRECTING THAT ORIGINAL EXHIBITS BE SENT UP AS A PART OF THE RECORD ON APPEAL.

56 (Title Omitted.)

To Honorable R. J. McMillan, Judge of Said Court:

Now come Selby Oil & Gas Company and Lewis Production Company, Plaintiffs in the above entitled and numbered cause, and show to the Court that upon the trial of this case certain exhibits were introduced in evidence, including maps, plats and drawings; that the issues involved in the case can be better presented on appeal if the originals of said exhibits are sent up as a part of the record on appeal.

Wherefore, Plaintiffs pray that the Clerk be directed to forward to the Circuit Court of Appeals for the Fifth

Circuit at New Orleans, Louisiana, as a portion of the record in this case, all original exhibits introduced in evidence upon the trial of this suit.

E. R. HASTINGS,

Tulsa, Oklahoma.

DAN MOODY,

Austin, Texas.

By DAN MOODY,
Attorneys for Selby Oil & Gas Company and Lewis Production Company.

57 Acknowledgment of Service.

Receipt of copy of the foregoing Motion for Order Directing that Original Exhibits Be Set Up As a Part of the Record on Appeal is hereby acknowledged and further service is waived, this the 12th day of October, 1940.

(S.) W. EDWARD LEE,
Attorney for Defendants, O. L. Hastings and C. F. Dodson.

Longview, Texas.

GERALD C. MANN,
By JAMES P. HART,
Attorney for Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler.

Austin, Texas.

Filed: 14th day of October, 1940.

58 APPEAL BOND.

The State of Texas,
County of Travis.

Know All Men By These Presents: That we, Selby Oil & Gas Company and Lewis Production Company, as Principals, and Fidelity and Deposit Company of Maryland, as Surety, are held and firmly bound unto the above named Defendants,. Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Defendants, their successors, heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, jointly and severally by these presents.

The condition of this obligation is such that:

Whereas, on the 18th day of July, 1940, in the District Court of the United States for the Western District of Texas, Austin Division, at Austin, Texas (by agreement of the parties the cause was tried before the said Court in San Antonio, Texas), in a suit therein pending on the docket of said Court, styled *Selby Oil & Gas Company and Lewis Production Company vs. Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson, G. A. Sadler, O. L. Hastings and C. F. Dodson*, a judgment was entered and rendered decreeing that plaintiffs recover nothing from defendants, or any of them, and plaintiffs' prayer be, and the same is hereby, in all things denied, all as more fully appears from said judgment on file and of record in the office of the Clerk of the said Court, to which judgment and the record thereof reference is hereby made for a more complete description, and for all purposes, and from which said judgment the Selby Oil & Gas Company and Lewis Production Company have prose-

cuted their appeal to the United States Circuit
59 Court of Appeals for the Fifth Circuit;

Now, therefore, if the said Selby Oil & Gas Company and Lewis Production Company shall prosecute their appeal with effect and secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified, then the above obligation is void, otherwise to remain in full force and effect.

Executed this the 12th day of October, 1940.

SELBY OIL & GAS COMPANY,
LEWIS PRODUCTION COMPANY,
By DAN MOODY,
Their Attorney of Record,
Principals.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
(Seal)
By A. N. McCALLUM, JR.,
Attorney-in-fact, Surety.

60 Power of Attorney.

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know All Men By These Presents: That the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, by B. H. Mercer, Vice-President, and T. N. Ferciot, Jr., Assistant Secretary, in pursuance of authority granted by Article VI, Section 2, of the By-Laws of said Company, which reads as follows:

"The President, or First Vice-President, or Second Vice-President, or any one of the Additional Vice-Presidents

specially authorized so to do by the Board of Directors or by the Executive Committee, shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries, to appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorney-in-Fact, as the business of the Company may require, or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgage, contracts, agreements and policies, and to affix the seal of the Company thereto."

does hereby nominate, constitute and appoint A. N. McCallum, Jr., of Austin, Texas, its true and lawful agent and Attoney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, all bonds or undertakings authorized by the laws of the State of Texas, requiring the approval of any Court in said State of Texas or Judge thereof, or the clerk or other officer empowered by law to approve such bonds; also bonds required by Order or Decree of the United States Courts for said State, and for Trustees and Receivers in Bankruptcy proceedings under the Bankrupt Act of the United States, each in a penalty not to exceed the sum of Fifty Thousand Dollars ($50,000).

II. Bonds each in a penalty not to exceed the sum of Ten Thousand Dollars ($10,000) required of State, County, Township or Municipal Officials in the State of Texas, whether elected or appointed, except those for Treasurers, Deputy Treasurers, Tax Collectors, Deputy Tax Collectors, Sheriffs, Deputy Sheriffs, Police, Constables and Justices of Peace.

61 III. License bonds, each in a penalty not to exceed the sum of Five Thousand Dollars ($5,000)

required by Statute of the State of Texas, or by Ordinance of any Municipality in said State, however, not including Motor Carriers' Bonds, Bus Bonds, Blasting Permit Bonds, Insurance Company Qualifying Bonds, Blue Sky Law Bonds, Warehouse Bonds, Gasoline Tax Bonds, Commission Merchants and Live Stock Bonds, Real Estate and Insurance Brokers Bonds, Collection Agents Bonds, and Industrial Alcohol Bonds.

IV. Bonds and undertakings in favor of the United States of America or any Department thereof, guaranteeing contracts for the construction or erection of buildings, improvements and other works, and contracts for supplies; bonds and undertakings guaranteeing contracts for the construction or erection in the State of Texas of public or private buildings and others works and contracts for supplies; provided, however, that the authority contained in this paragraph does not embrace any bond or undertaking guaranteeing a contract under which the contract price exceeds the sum of Fifty Thousand Dollars ($50,000).

V. Fidelity bonds covering salaried officers and salaried employees of persons, firms, corporations and associations conducting mercantile, manufacturing, financial and other business enterprises, however, not including Blanket Fidelity and Bankers and Brokers Blanket Bonds. The amount of bond on each of such officers and employees not to exceed the sum of Ten Thousand Dollars ($10,000).

VI. This power does not include bonds on behalf of Independent Executors and bonds on behalf of Community Survivors as Administrators of Community Estates.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said

Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

(Seal)

The said Assistant Secretary does hereby certify that the foregoing is a true copy of Article VI, Section 2, of the By-Laws of said Company, and is now in force.

In Witness Whereof, the said Vice-President and Assistant Secretary have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 26th day of January, A. D. 1939.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND.
By B. H. MERCER,
Vice-President.

Attest:
T. N. FERCIOT, JR.,
Assistant Secretary.

62 State of Maryland,
City of Baltimore, ss:

On this 26th day of January, A. D. 1939, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came the above-named Vice-President and Assistant Secretary of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the

said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

(S.) LUCILLE M. WRIGHT,
(Seal) Notary Public.

My Commission Expires May 1, 1939.

Appeal Bond. Filed: 14th day of October, 1940.

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63 ORDER DIRECTING ORIGINAL EXHIBITS TO BE FORWARDED.

(Title Omitted.)

An appeal in the above entitled and numbered cause having been taken by Plaintiffs Selby Oil & Gas Company and Lewis Production Company, and it appearing to the Court upon motion of said Plaintiffs that all of the original exhibits introduced in evidence upon the trial of this cause should, in lieu of copies, be sent to the Appellate Court for inspection;

It is Hereby Ordered that the Clerk of the District Court of the United States for the Western District of Texas, Austin Division, forward to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, as a

portion of the record in this case, all of the original exhibits introduced in evidence upon the trial of this action, being Exhibits Nos. 1 to 9, inclusive.

Entered at San Antonio, Texas, this the 15th day of October, 1940.

(S.) ROBERT J. McMILLAN,
Judge.

Approved as to form:
W. EDWARD LEE,
Atty. for O. L. Hastings and
C. F. Dodson.
JAMES P. HART,
Attorney for Railroad Commission of Texas and its members.

Entered: Civ. O. B., Vol. 1, page 146.

64 Filed: October 15, 1940.

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65 STATEMENT OF EVIDENCE.

Court Reporter's Q. & A.

(Title Omitted.)

Be It Remembered that heretofore, to-wit, on the 18th day of July, 1940, came on to be heard the above entitled and numbered cause, before the Hon. Robert J. McMillan, Judge of said Court, sitting (by agreement of all parties

herein) at San Antonio, Texas, the same being the San Antonio Division of the Western District of Texas.

Appearances:

Dan Moody, Esquire, Counsel for Plaintiffs.

James P. Hart, Esquire, Asst. Attorney General of Texas, Counsel for Defendants Railroad Commission of Texas and Commissioners Smith, Thompson and Sadler.

W. Edward Lee, Esquire, Counsel for Defendants Hastings and Dodson.

Whereupon, all preliminary matters having been settled and disposed of, the following evidence was adduced and proceedings had in connection therewith:

66 (During the statement by counsel for plaintiffs of plaintiffs' complaint the following proceedings were had:)

Mr. Moody:

The Lewis Production Company and Selby Oil & Gas Company are foreign corporations; there is a diversity of citizenship.

The Court:

Is the matter of jurisdiction contested, Mr. Lee?

Mr. Lee:

The matter of jurisdiction is contested for failure to state a jurisdictional amount, but not on diversity of citizenship.

Mr. Moody:
That, your honor, you remember was presented at Austin and acted on by the Court?

The Court:
Yes.

(Counsel for plaintiffs thereupon continued his statement of plaintiffs' complaint, and counsel for defendants Hastings and Dodson stated their answer; whereupon the following proceedings were had:)

The Court:
Have you stipulated as to the facts or are you going to introduce evidence?

Mr. Lee:
We can stipulate on practically all of the record facts, and the only oral testimony will be that of the engineers for the particular parties.

The Court:
Can you stipulate it now?

Mr. Moody:
Yes, sir. I introduce this map in evidence.

(The above referred to map was thereupon received in evidence and marked EXHIBIT 1, the same being sent up in the original.)

Mr. Moody:
It is stipulated, your Honor, that the map which the reporter has marked as plaintiffs' Exhibit 1 correctly shows
67 the location of the defendants' Jim Dickson 3.85 acre tract, and that the map also correctly shows the location of all surrounding tracts; it is further

stipulated that this map correctly shows the location of existing wells on the defendants' Hastings and Dodson tract and existing wells on all surrounding tracts and that the acreages in each of the tracts shown on the map, including the defendants' Hastings & Dodson tract and surrounding tracts, are substantially correct. That is right, is it?

Mr. Lee:

Yes.

Mr. Moody:

It is further stipulated that the defendants Hastings and Dodson own a seven-eighths oil & gas leasehold estate on the Jim Dickson 3.85 acres shown on the map, being out of the Mary Cogswell Survey in Rusk County, Texas; that Selby Oil & Gas Company and Lewis Production Company own a seven-eighths oil & gas leasehold estate covering the Tom Bean forty-three acre tract out of the Mary Cogswell Survey, shown on this map; it is further stipulated that Selby Oil & Gas Company is a corporation organized under the laws of the State of Delaware and that Lewis Production Company is a corporation organized under the laws of the State of Pennsylvania; it is further stipulated that the order involved in this case granting Hastings & Dodson a permit to drill a second well on the Hastings & Dodson Jim Dickson 3.85 acre tract was granted by the Railroad Commission on the 5th day of July, 1939; it is stipulated that the order of the Railroad Commission, dated July 5, 1939, granting the defendants Hastings and Dodson a permit to drill a second well on their Jim Dickson 3.85 acre tract in the Mary Cogswell Survey,
68 Rusk County, Texas, is in words and figures as is shown by plaintiffs' Exhibit 2, which I now offer in evidence.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 2, the same being sent up in the original.)

Mr. Moody:
Is that all?

Mr. Lee:
Except that we have further stipulated that any orders of the Railroad Commission or any rules passed by them, copies of them instead of furnishing certified copies may be offered in evidence, subject to any other objection.

Mr. Moody:
That is right.

The Court:
This map here doesn't show any interest of the Lewis Production Company in this lease.

Mr. Moody:
It is stipulated that Lewis Production Company and Selby Oil & Gas Company jointly own that forty-three acre tract, that tract of approximately forty-three acres.

Mr. Lee:
While the Court has that plat before him I want to call your attention to the fact that there are shown on the Hastings & Dodson tract two locations that are not wells,

The Court:
What do you have, only one well?

Mr. Lee:
Yes, sir.

The Court:
And two proposed wells?

Mr. Lee:
Two proposed wells, but only one was granted.

The Court:
How many acres have you there?

Mr. Lee:
3.85 acres in that tract.

The Court:
All right.

Mr. Lee:
And that the wells thereon are shown by the solid dots and the proposed locations are shown by the open dots.

69 The Court:
All right.

Mr. Moody:
I think we further can stipulate that in April, 1939—that the hearing on the application for this permit was heard before the Railroad Commission on April 26, 1939, and that the order granting the permit was entered, as shown by plaintiffs' Exhibit 2, on July 5, 1939, and that in April, 1939, and in July, 1939, the method of prorating the field allowable for the East Texas Oil Field was fixed at approximately 522,000 barrels of oil per producing day. Is that about right, Mr. Hudnall?

Mr. Hudnall:
April, 1939, yes.

Mr. Moody:
522,000 barrels per producing day; that that allowable was distributed among wells on a basis of allowing to each well that could not produce as much as twenty barrels per day the maximum of which it was capable of producing; that there were approximately 450 wells of that class. Is that not right, Mr. Hudnall?

Mr. Hudnall:
About that.

Mr. Moody:
That the balance of the daily field allowable was prorated among wells so that each well that was capable of producing more than twenty barrels per day received a minimum of twenty barrels per day and wells having hourly potentials in excess of 858.65 barrels were allowed to produce 2.32 per cent of their hourly potential, with the result that the maximum allowed to any well was approximately twenty-six barrels of oil per day; that in the actual working of that formula in the distributing of the allowable among the wells approximately ninety-eight per cent was on a per well basis and approximately two per cent was on potential factor. That is as to
70 April and July. Now, there is another question that I believe we have an understanding on, and that is that the Railroad Commission has consistently refused to adjust allowables on the basis of acreage and drilling density?

Mr. Lee:
Yes.

Mr. Moody:
All right.

Mr. Hart:
If the Court please, I want to be sure that I understand what Governor Moody means there. As I understand it he means when a well permit is granted and a protestant asks that if the well is granted the allowable be adjusted between the individual tracts on the basis of density or acreage, that the Commission has refused to do that?

Mr. Moody:

That is what I mean. Where the protestant asks that if the well is granted, then that the allowable for the tract on which the well is to be drilled and the surrounding tracts be adjusted on a density and acreage basis.

Mr. Hart:

In other words, that the Commission enforces the general rule for the field and does not make special adjustments on the basis of density with reference to particular tracts?

Mr. Moody:

That is right.

Mr. Lee:

Can we further agree, Governor, that these wells are so located upon the structure that the tract upon which it is granted and the surrounding and adjoining tracts didn't, at that time, get any advantage of the two per cent on allowable, but that it was on a flat per well basis as affecting this immediate area under the order existing during April and July of 1939?

71 Mr. Moody:

Yes, that all wells, the wells shown on the defendants' Hastings & Dodson tract and all wells shown on tracts surrounding it, under the proration formula existing in April and July, 1939, each got the twenty barrel per well allowable, no more and no less.

The Court:

All right. Have you any oral evidence?

Mr. Moody:

Yes, sir, and I have some record evidence here which I would like to offer, your Honor. I offer in evidence a certificate of C. F. Petet, secretary of the Railroad Com-

mission of Texas, showing the allowable in April and July, 1939, for the Tidewater Associated Oil Company's S. S. Laird 17.82 acre lease to be sixty barrels, which was then a lease with three wells—

Mr. Lee:
Isn't that already covered by the proof that is already evidence?

The Court:
This is a trial before the Court; it doesn't make any difference.

Mr. Moody:
I will just offer this certificate.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 3, the same being sent up in the original.)

Mr. Moody:
I believe when I said we stipulated that that map correctly shows the location and number of wells on each of the leases shown thereon, and the map is plaintiffs' Exhibit 1, I think I stated that as of the present time, but that is as of April, 1939, your Honor.

Mr. Lee:
That is right.

72 Mr. Moody:
I now offer in evidence a certificate of the State Comptroller of Public Accounts showing the production reported to the comptroller by Hastings & Dodson from the Hastings & Dodson Jim Dickson 3.85 acre lease in Rusk County from September, 1933, up to April, 1940, and I ask the reporter to mark that plaintiffs' Exhibit 4.

Mr. Lee:

Your Honor, we object to the inclusion of any portion of the production after April of 1939, the date on which the Railroad Commission acted, because we think the Court will be restricted in its deliberation as to conditions as they existed at that time and not according to changed conditions, because as to those the Railroad Commission hasn't yet acted.

The Court:

Overrule the objection.

Mr. Lee:

Note the exception.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 4, the same being sent up in the original.)

Mr. Moody:

I next offer in evidence a certificate of the comptroller showing the production from June, 1931, to April, 1940, from the Sinclair Prairie Oil & Gas Company's Major Kenedy B lease; also showing production from June 30, 1931, to date from the Tidewater Oil Company's S. S. Laird lease, and also showing the production from September, 1932, to date from the National Oil & Grease Company's—

The Court:

What do you consider to be the significance of that?

Mr. Moody?

It shows, your Honor, the amount of oil that they had produced up to the time the permit was granted—to date, rather—and also up to the time the permit was
73 granted, from these various surrounding leases so as to show whether or not there was any justi-

fication for the Railroad Commission order granting this permit to prevent confiscation of property. That is the reason assigned by the Commission for it. Also showing the production from the Overton Refining Company from their Dave Wade lease from April, 1932, to date, and the production from the Weaver-Crim Corporation's Francis Bean B lease from December 31, 1932, to the date of April, 1940, and the production from the Selby Oil & Gas Company's and Lewis Production Company's Tom Bean lease from September, 1933, to April, 1940, and I ask the reporter to mark this certificate as plaintiffs' Exhibit 5.

Mr. Lee:

We have the same objection to all parts of those certificates from and after June 1, 1939.

The Court:

All right.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 5, the same being sent up in the original.)

Mr. Moody:

I also offer in evidence from the file of the Railroad Commission the report of J. D. Copeland, the examiner who held the hearing on this application. This is a file of the Railroad Commission. I wonder if we might detach it, Mr. Hart, and let the reporter make a copy of it and return it to you?

Mr. Hart:

All right. However, if it is all right, I can have a copy made.

Mr. Moody:

That is all right, and it will be plaintiffs' Exhibit 6.

74 (The above referred to document was thereupon received in evidence and marked EXHIBIT 6; such original document being withdrawn and a copy thereof led in this cause on July 20, 1940, the same being sent up as an original exhibit.)

Mr. Moody:

It was well No. 2 that was granted, your Honor. We also offer in evidence as plaintiffs' Exhibit 7 the order of the Railroad Commission dated June 17, 1940, overruling Sinclair-Prairie Oil Company's motion for rehearing on the order granting the permit.

(The above referred to document was thereupon received in evidence and marked EXHIBIT 7, the same being sent up in the original.)

Mr. Moody:

I wonder if we couldn't agree that Mr. Parker, who is called as an expert by the plaintiff—

The Court:

I have known Mr. Parker for years, and I should think you could stipulate that he is qualified.

Mr. Moody:

I was going to propose they state Mr. Parker is qualified.

Mr. Lee:

It will be admitted he is qualified.

Mr. Moody:

And I will stipulate that Mr. Hudnall is qualified as a petroleum engineer.

R. D. PARKER, a witness for the Plaintiffs, was sworn and testified as follows:

Direct Examination.

Questions by Mr. Moody:

Q. Please state your name.

A. R. D. Parker.

75 Q. Where do you live, Mr. Parker?

A. Austin, Texas.

Q. Mr. Parker, have you made a study of the East Texas field?

A. I have.

Q. By the East Texas field I mean the East Texas Oil Field, of course. At my request have you made a study of the Hastings & Dodson Jim Dickson 3.85 acre lease out of the Mary Cogswell Survey in Rusk County, Texas, and the leases surrounding that Hastings & Dodson lease?

A. Yes, sir, I have.

Q. Mr. Parker, what are the facts with respect to whether or not the sand conditions in the producing horizon underneath the Hastings & Dodson lease and underneath the leases immediately adjacent to it are substantially the same throughout that area of the field?

A. They are substantially the same except that the thickness, there is some slight variation due to thickness of the sand as you move from east to west; and as to that fact I use an average thickness for the area which I think is representative.

Q. In your calculations that you are going to testify about you have used an average thickness, is that right?

A. Yes, sir.

Q. What part of the East Texas Oil Field is this particular area of land in?

A. It is in the eastern portion of what is called the fairway or central or most productive and best portion of the field.

Q. Have you made calculations to show the recoverable oil under the Hastings & Dodson lease and the
76 leases surrounding the Hastings & Dodson lease?

A. Yes, sir, I have. I have made an estimate of the probable future recovery of oil in that area.

Q. Please state to the Court how you made those calculations.

Mr. Lee:

We will object unless the witness shows as to what time he confined those calculations, whether as of this time or as of the time the permit was granted.

The Court:

What difference does it make?

Mr. Lee:

We think it makes this difference: that at the time the Railroad Commission acted they were confronted with certain conditions that they couldn't be passing on now because we are reviewing an order made in July.

The Court:

If their action was incorrect we would be entitled to ascertain it by the facts as they exist now. It isn't just a question as to whether they guessed right or not at that time. Overrule the objection.

Mr. Lee:

Note our exception.

Q. Please state to the Court how you made those calculations.

A. The estimate was made on what is known as the volumetric method, which takes into account the porosity of the sand, the thickness of the sand, the probable recovery factor and the shrinkage due to the difference in

volume of oil in the sand and the pressures and temperatures existing in the sand and the pressures and temperatures existing on the surface or under atmospheric conditions.

Q. Is that a method of calculating prospective recoveries that is accepted and followed by petroleum engineers generally?

A. It is.

77 Q. In calculating prospective recoveries in the East Texas field?

A. It is.

Q What did you figure to be the acreage of the Hastings & Dodson lease and the leases adjacent thereto?

A. You mean the total for the entire area?

Q. Yes, sir.

A. 149.8 acres.

Q. What did you calculate to be the prospective—or the amount of recoverable oil remaining under these leases?

A. 3,349,827 barrels.

Q. Did you figure that as of what date, do you remember?

A. Well, the conditions prevailing at the time the hearing was held.

Q. You took those figures as of the time the hearing, that is, April, 1939?

A. Yes, sir.

Q. Now, Mr. Parker, how many wells did you find to be on the 149.8 acres?

A. Thirty-eight.

Q. Their daily allowable at the time of the hearing was 760 barrels per day, I believe?

A. That is correct.

Q. What did you calculate would be the period of years required to produce the oil, or your estimate of the recoverable oil, under this 149.8 acres of land?

A. Approximately twelve years.

Q. Did you undertake to figure on the basis of acreage the percentage of the estimated recoverable oil
78 under the tracts—that belonged to those tracts, respectively?

A. Yes, sir.

Q. Have you made a tabulation of those figures?

A. I have.

Q. Do you have it there in your hand?

A. I do.

Q. Will you read that tabulation, please?

A. The fair ratable share of the total production of 3,349,827 barrels going to the Tidewater Laird 17.8 acres would be 307,959 barrels; that going to the National Oil & Grease Company's Dickenson lease, 14½ acres, would amount to 323,328; that going to the Selby Oil & Gas Company Bean lease, the 43 acres, amounts to 961,400 barrels; that going to the Weaver-Crim Bean, 16.7 acres—

The Court:

Where is that tract?

Mr. Moody:

Just below the highway, your Honor; Weaver-Crim, a triangular piece.

A. South of the Selby tract.

The Court:

Go ahead, I see it.

A. That going to the Weaver-Crim Bean lease, of 16.7 acres, would be 373,171 barrels; that going to the Sinclair Kenedy and Overton Refining Company Wade, considered jointly, amounting to 54 acres, would be 1,207,278 barrels; that going to the Hastings & Dodson lease, of 3.85 acres, amounts to 86,091 barrels.

Q. Now, in answering my question you stated there certain amounts as going to leases that you called. Is that based on the percentage of the recoverable oil
79 that those leases would have, figuring the relation which their respective acreage bears to the total acreage in all the leases?

A. That is correct.

Q. That is the way you arrive at those figures?

A. That is correct.

Q. Now, if you calculate two wells on the Hastings & Dodson Dickson lease, what will be the effect as to its annual allowable as compared with the annual allowable of the other leases in the 149 acres?

A. Well, it will be doubled.

Q. It will be double the present allowable?

A. It will be double the present allowable.

Q. Have you prepared a table that would show what would be the annual allowable on a basis of twenty barrels per well per day to these various leases?

A. Yes, sir.

Q. Assuming that a second well had been drilled on the Hastings & Dodson lease?

A. That is correct.

Q. Is that shown on page 3 of your report?

A. It is.

Q. Do you have two copies of that report?

A. Yes, sir.

Mr Moody:

If I may, I will give the Court a copy and let these gentlemen have a copy and question him from that copy.

The Court:

Are you going into detail with this witness? I think I pretty generally understand what this is about.

80 Mr. Moody:

I won't go into great detail.

Q. Mr. Parker, have you made a calculation as to what amount of oil would be drained from the Selby Oil & Gas Company's Bean lease, based upon your calculation of the recoverable oil underneath the 149 acres of land, and on the assumption that the 20 barrel allowable per well per day will continue, and based upon the assumption that a second well is drilled on Hastings & Dodson tract of land?

A. Yes, sir.

Q. And have you also made like calculations for each of the leases adjoining the Hastings & Dodson lease?

A. I have. It shows the gains and losses.

Q. Do you have a tabulation of that?

A. I have.

Q. Is that the tabulation shown at the bottom of page 3 of your report?

A. That is correct.

Q. What about the Tidewater, will it lose or gain?

A. The Tidewater will lose 133,505 barrels.

Q. What about the National Oil & Grease Company with respect to its Dickenson lease, will it lose or gain?

A. It gained 28,679.

Q. What about the Selby Oil & Gas Company?

A. It would lose 79,881.

Mr. Hart:

If the Court please, we wish to object to that question and the answer for the reason that there is no separation of the drainage between the two wells which will be on the Hastings & Dodson lease. As I understand, the measure of damages, if any, will have to be the drainage caused by the additional well, and there is no separation of the drainage of one well from the other; we therefore believe this evidence is immaterial.

81

The Court:

Of course Mr. Parker knows a lot more about it than I do, but I have dealt with the East Texas field a good

deal, and the Selby people have about eight or nine wells on their tract and the Weaver-Crim people have three wells down there on their tract and they offset this Hastings & Dodson tract, and the National Oil & Grease Company has four wells on their tract, and it is all common reservoir there, the sand has the same porosity and permeability and practically the same thickness. It seems to me they drain one another. I can't see much significance in one additional well being in there.

Mr. Moody:

Well, your Honor, I think we have a calculation that will take care of Mr. Hart's objection and it will take just a moment to put it in.

The Court:

All right.

Q. What do you calculate to be the result on the Weaver-Crim tract, whether or not it will gain or lose oil if a second well is drilled?

A. Weaver-Crim will lose 20,564 barrels.

Q. What about the Sinclair-Prairie and Overton Refining Company Wade lease with respect to whether that would gain or lose?

A. It would gain 115,000 barrels.

82 Mr. Lee:

We think that is immaterial because the only question here is the relative rights of the two litigants rather than taking in the whole area.

The Court:

Isn't the question here whether the Court should revise the discretionary action of the Railroad Commission?

Mr. Lee:
I think that is the sole question.

The Court:
Are the facts conflicting?

Mr. Lee:
What?

The Court:
I did that once and I got reversed doing it.

Mr. Moody:
Your Honor, I think there are some other questions in this case and I think they will develop.

The Court:
All right.

Mr. Moody:
May I have an answer to the last question?

The Court:
Yes, sir.

A. I think I answered it, 115,000 barrels.

Q. Hastings & Dodson, what would be the effect if they are allowed two wells, with respect to how much they would recover compared to the percentage of the oil under their lease?

A. They would gain 90,205 barrels.

Q. Mr. Parker, have you prepared in typewritten form analysis of your study of this question?

A. Yes, sir.

Mr. Moody:
I am going to give counsel for the defendants a copy of it, and I would like to put it in evidence as a more simple way of stating it than by asking questions about it.

83 Q. Mr. Parker, have you calculated the density of the several leases, of the Hastings & Dodson lease and the several leases surrounding it, on the basis of one well to the Hastings & Dodson 3.85 acre lease?

A. I have.

Q. You have?

A. Yes, sir.

Q. What is the density of the Selby Oil & Gas Company and Lewis Production Company lease?

A. One well to 4.34 acres.

Q. What is the density of the Weaver-Crim lease?

A. One well to 4.79 acres.

Q. What is the density of the Tidewater Laird lease?

A. One well to 3.36.

Q. The Tidewater Laird?

A. Yes, sir.

Q. How much?

A. One well to 3.36—no, that is wrong.

The Court:

What will the additional well on the Hastings & Dodson lease make it?

Mr. Moody:

It would make it 1.925.

A. That Tidewater Laird should be .891.

Q. It is 17.82 acres in the Tidewater Laird lease, I believe, isn't it? Yes. And three wells on there would be 5.94, would it not?

A. Yes, sir, that is correct.

Q. What is the density of drilling on the National Oil & Grease Company Dickenson lease?

84 A. One well to 5.61 acres.

Q. On the Sinclair-Prairie Major Kenedy?

A. One well to 5.38.

Q. The density of the Crosby-Overton Refining Company two acre lease?

A. One well to 10.

Q. One well to what?

A. 10.

The Court:

10 acres.

Q. One well to two acres?

A. One well to two acres, sure.

Q. Have you calculated the average density of these leases surrounding the Hastings & Dodson lease?

A. The average density is one well to 4.93 acres.

Q. With one well the Hastings & Dodson lease has a density of one well to 3.85 acres?

A. That is right.

Q. Now, Mr. Parker, based upon the comptroller's certificates as to the amount of oil produced from the several leases that have been referred to in these last questions I have asked, have you calculated the recovery of these several leases per acre of the lease and do you have a tabulation of it?

A. Governor, I beg your pardon, I read from the wrong statement here. May I read the densities as you asked them?

Q. Yes, if you made a mistake please correct it.

A. I was reading from the wrong column. The density on the Selby-Lewis tract, the 43 acres for 10 wells
85 on it is one well to 4.3 acres; the density on the Weaver-Crim tract of 16.7 acres with four wells on it is 4.175; the density on the Tidewater Laird tract with 17.82 acres and three wells in 5.94; the density on the National Oil & Grease Company Dickenson 14.5 acres with four wells is 3.62; the density on the Sinclair Major Kenedy tract of 52 acres with fourteen wells is 3.70; the

density on the Overton Refining Company Wade with two acres with one well is one well to two acres.

The Court:
Where is that tract?

Mr. Moody:
Right down below in the corner you will see it, cut in in the Sinclair lease just west of the road shown on the map, your Honor.

The Court:
All right.

A. The average density of all of those tracts is one well to 4.05 acres, and the density of the Hastings & Dodson Dickson lease of 3.85 acres with one well would be one well to 3.85 acres, and two wells would be one well to 1.92 acres.

Q. All right, at present the Hastings & Dodson lease with one well is drilled to a greater density than any of the surrounding leases with the exception of the Sinclair lease, which is 3.7 acres per well as against 3.85 acres per well on the Hastings & Dodson, and the Overton Refining Company lease, which is two acres per well as against 3.85 on the Hastings & Dodson, is that right?

A. That is correct.

Mr. Lee:
There is one more, National Oil & Grease.

Q. National Oil & Grease Company, yes, its density is 3.62 acres per well as against Hastings & Dodson
86 of 3.85?

A. That is correct.

Q. Have you calculated, from the reports of the comptroller which have been offered in evidence here, as to

the amount of production from these seven leases, the recovery per acre from each of these leases, respectively, up to April, 1940?

The Court:
What is the materiality of that, counsel?

Mr. Moody:
Your Honor, the Railroad Commission granted this permit on the basis that it was necessary to prevent the confiscation of property. The purpose is to show that at this time the Hastings & Dodson with the one well on it has recovered more oil per acre than the average of the surrounding area and more oil per acre than any surrounding lease with the exception of the Tidewater, and substantially the same amount as the Tidewater, and then the other one that has exceeded Hastings & Dodson is the Overton Refining Company.

The Court:
Haven't these three-judge Federal Courts consistently held we can't adjust matters that took place in the past?

Mr. Moody:
I think that is correct, your Honor, but I am not asking an adjustment of matters that took place in the past. If your Honor will recall, in the report of the examiner who made the report on this hearing to the Railroad Commission he stated testimony was that on the spacing arrangement there is no net loss of oil on applicant's lease. This was brought out on cross examination. Now, the Railroad Commission has granted the permit to prevent the confiscation of property.

87 The Court:
I don't know what the record will eventually show in this case, but I know in many other cases I have

tried they have held with regard to that fairway that as fast as you take the oil out other oil comes in.

Mr. Moody:
That is true.

The Court:
And you don't lose any oil; maybe you lose a little pressure.

Mr. Moody:
Your Honor, the point that I have in mind is to show that there is no substantial basis in fact to support the Railroad Commission order. Now, the Railroad Commission has made an order here and they have stated their reasons for granting this permit—

The Court:
I don't want to curtail you, but it doesn't seem to me it makes much difference as to what they produced in the past because they probably have just as much oil under there now as they had to start with.

Mr. Moody:
The purpose of offering the testimony is to show there is—

The Court:
Do you think it is material to go into the record?

Mr. Moody:
Yes, sir, I think it is.

The Court:
Will you curtail it?

Mr. Moody:

Yes, sir, it will be very brief. I guess I may lead him?

Mr. Lee:

Go ahead.

Q. The Selby Oil & Gas Company has produced per acre up to April 1940—or is that April, 1939?

A. 1940.

88 Q. 9,502.73 barrels, is that correct?

A. That is correct.

Q. Weaver-Crim 10,795.28 barrels?

A. That is correct.

Q. Tidewater Laird 11,594.04 barrels per acre?

A. That is correct.

Q. National Oil & Grease Company Dickenson lease 12,370.39 barrels per acre?

A. That is correct.

Q. Sinclair Major Kenedy lease 10,760.44 barrels?

A. That is correct.

Q. The Overton Refining Company Wade lease 31,860.57 barrels per acre?

A. That is correct.

Q. Do you know what the average production per acre from that list of leases is?

A. The average for all you have named?

Q. Yes, sir.

A. 10,946 barrels—44 barrels.

Q. Now, the production from the Hastings & Dodson lease up to April, 1940, per acre was 12,270.12 barrels, is that correct?

A. That is correct.

Q. Now, Mr. Parker, those figures show, do they not, that the only two leases in the area that have produced more per acre than the Hastings & Dodson lease is the National Oil & Grease Company lease, which has produced a little more than 100 barrels more per acre?

A. Yes, sir.

89 Q. And then the Overton Refining Company lease?

A. They produced 31,860 barrels.

Q. Hastings & Dodson have produced more per acre than the average of the surrounding area, is that not correct?

A. That is correct.

Q. Have you made a tabulation showing it based on a twenty barrel allowable? Have you made a tabulation showing the allowable per acre for the Hastings & Dodson lease and the surrounding leases?

A. Yes, sir.

Q. That is as of April and July, 1939?

A. That is right.

Q. Is that of the Tidewater 3.36 barrels per acre per day?

A. That is correct.

Q. National Oil & Grease Company's lease 5.51 barrels per acre per day?

A. That is correct.

Q. Selby Oil & Gas Company and Lewis Production Company's lease 4.34 barrels per acre per day?

A. That is correct.

Q. The Weaver-Crim lease 4.79 barrels per acre per day?

A. That is correct.

Q. Sinclair-Prairie 5.38 barrels per acre per day?

A. That is correct.

Q. Overton Refining Company 10 barrels per acre per day?

A. That is correct.

Q. Now, the average of those several leases was 4.93 barrels per acre per day?

90 A. Yes, sir.

Q. The Hastings & Dodson lease was 5.19 barrels per day per acre with one well, is that correct?

A. That is correct.

Q. Two wells would be 10.38 barrels per acre per day, would it not, if the second well was drilled?

A. 9.

Q. Twice 5.19 would be 10.38?

A. That is right, 10.38.

Q. In your opinion does the Selby Oil & Gas Company lease at this time have a sufficient number of wells on it to produce its fair share of the recoverable oil?

A. In my opinion it has.

Q. How about the Weaver-Crim lease?

A. It has.

Q. How about the Sinclair lease?

A. It has.

Q. How about the Overton Refining Company lease?

A. It has.

Q. How about the Tidewater Oil Company lease?

A. It has.

Q. How about the National Oil & Grease Company lease?

A. It has.

Q. How about the Hastings & Dodson lease with one well on it?

A. It has.

Q. In your opinion would Hastings & Dodson, with one well on that lease, during the life of the field and on a basis of twenty barrels per day as was in force
91 in April and July, 1939, twenty barrels per day per well, recover, in the life of the field, an amount of oil substantially equivalent to the recoverable oil originally in place under the Hastings & Dodson lease and in place under that lease in April and in July, 1939?

A. In my opinion it would.

Q. With its one well it produces more oil per acre per day—or was in April and July, 1939, with one well, it was producing more oil per acre per day than the average of the leases surrounding it, was it not?

A. That is correct.

Q. Now, it is your opinion, is it, that if the Hastings & Dodson are allowed to drill a second well on their 3.85 acre lease that that lease will have then a production and drainage advantage over each and every lease surrounding it?

A In my opinion it would.

Q. Including the Overton Refining Company lease?

A. Yes, sir.

Q. Based upon your study of the facts with regard to these several leases, what is your opinion as to whether or not in April, 1939, and July, 1939, the Hastings & Dodson lease was or was not suffering drainage of oil to other leases that would ultimately result in Hastings & Dodson being prevented from recovering an amount of oil substantially equivalent to the amount of recoverable oil then in place under that lease?

A. In my opinion it wasn't suffering that sort of drainage.

The Court:

What did you say?

A. It was not suffering that sort of drainage.

92 Q. Is it or not your opinion that if the second well is drilled on this Hastings & Dodson tract that the Hastings & Dodson lease will be allowed to recover more oil than the amount of recoverable oil originally in place under that lease?

A. Yes, sir.

Q. What is your opinion as to whether or not the drilling and production of a second well on this lease will result in production from the Hastings & Dodson lease of more oil than the amount of recoverable oil under that lease in April, 1939, and July, 1939?

A. With the two wells it would, yes, sir.

Q. Now, when you talk about recoverable oil originally in place and in place now under the lease, or at any given

date, do you take into account there, do you attempt to estimate the amount of oil that migrates to a lease by reason of the physical structure of the East Texas field?

A. Yes, sir.

Q. So, then, it is your opinion that if this second well is drilled Hastings & Dodson will be given a decided advantage over the surrounding leases in the production of oil?

A. Yes, sir. There is regional migration from west to east, Governor, but the disparity in the recoveries here per acre as between the Hastings & Dodson lease and surrounding leases would more than take care of that. In other words, when the oil came into the area the Hastings & Dodson lease would get the advantage and get more oil than it otherwise would, relatively more than it otherwise would.

93 Q. All right. Now, this advantage that Hastings & Dodson will get in production of oil by having two wells, is that the cause of the Selby lease and other leases you mentioned earlier in your testimony?

A. Yes, sir.

Cross Examination.

Questions by Mr. Lee:

Q. Mr. Parker, do you subscribe to the now generally accepted theory of the migration of the oil from the west to the east in this field?

A. Yes, sir, I think that is true.

Q. Then under that theory as oil is taken from the reservoir immediately under these wells it is replaced by oil moving in from the west, isn't it?

A. It is unless the water was encroached sufficiently—

Q. Is this area producing any water at this time?

A. There are some wells in this area that are producing water, Mr. Lee.

Q. What wells, please, sir.

A. I don't believe I made a memorandum. I ascertained that fact from the Railroad Commission water report as April 1st, which is the nearest water report—April 1, 1939—which is the water report nearest the date on which this hearing was held. There are a number of wells in the area making water now, varying in percentage. We don't know how much of the area has been taken up by water or how much of the sand volume has been taken up by water.

Q. All the wells in this area are on the pump, aren't they?

94 A. Yes, sir.

Q. And have been for sometime?

A. Yes, sir, that is correct.

Q. How close is this Dickenson No. 4 from the Hastings & Dodson line?

A. It is very close to the line.

Q. About 80 feet, isn't it?

A. The National Oil & Grease?

Q. Yes.

A. Dickenson?

Q. Yes. It shows to be about 80 feet on that plat, doesn't it?

A. Probably so.

Q. Hastings & Dodson doesn't have a well that close to their line, do they?

A. No, sir, but the density makes the difference.

Q. How close is Weaver-Crim's well to that lease?

A. It is approximately the distance that the National Oil & Grease Dickenson No. 4 is, about 80 feet or 100.

Q. Then Weaver-Crim is closer to Hastings & Dodson than Hastings & Dodson is to Weaver-Crim, aren't they?

A. Yes, sir.

Q. Then at least two wells are closer to Hastings & Dodson than they are to anybody else?

A. That is right.

Q. Now, you have prepared a map, Mr. Parker, on your usual eight times density theory that you proceed on in the State Courts generally?

A. Yes, sir.

Q. Will you let me see that, please, sir?

95 A. I don't have it.

Mr. Lee:

Don't you have one, Governor?

Mr. Moody:

No, I haven't. I have this map.

A. Mr. Lee, I think the figures I have conform to those Mr. Hudnall has.

Mr. Lee:

Mr. Hudnall doesn't have his map with him, but I thought I saw one.

Mr. Moody:

I think I made that thing.

A. That map is not one that I had anything to do with.

Mr. Lee:

This will serve as a little guidance for me, anyway.

Q. If you draw an eight times circular area, Mr. Parker, from the center of the Hastings & Dodson tract you would have eight times the area of the Hastings & Dodson tract within that circle, wouldn't you?

A. Yes, sir.

Q. How many wells would you embrace within that circular eight times area?

A. Well, under the comparison I made it was in the form of a square instead of a circle, but I believe you

would have the same number of wells in the circle as in the square. The figure I have is eleven wells.

Q. If you lay off an eight times area around the Hastings & Dodson lease, either circular, in a square or a trapezoid it would include in this instance the same number of wells, wouldn't it?

A. I think that is true. I haven't tested it out.

Q. It would include eleven wells, wouldn't it?

96 A. Yes, sir.

Q. Exclusive of the Hastings & Dodson well?

A. That is correct.

Q. So that within the eight times area at that time it placed the Hastings & Dodson well at a thirty-seven and one-half per cent density disadvantage, didn't it?

A. That is correct, within those limits.

Re-Direct Examination.

Questions by Mr. Moody:

Q. Mr. Parker, if the Selby Oil & Gas Company attempted to drill, or the Railroad Commission permits Selby Oil & Gas Company to drill another well on its lease in an attempt to reduce the drainage you have testified would take place from the drilling and production of the second well on the Hastings & Dodson tract, what is your opinion with respect to whether or not such well would completely prevent the drainage or only reduce what would otherwise be the extent of the drainage because of the second well on the Hastings & Dodson lease?

A. No, sir, that well would not make up the difference.

Q. You mean by that it would not prevent, it would only reduce?

A. That is right.

Q. What would it cost to drill another well, approximately, and equip it on the Selby Oil & Gas Company lease?

Mr. Lee:
We object to that.

The Court:
I don't see that there is any materiality to it.

97 Mr. Moody:
It is pleaded as an element of damage. He has testified that the Selby Oil & Gas Company now has all the wells that are necessary.

The Court:
Overrule the objection.

Mr. Lee:
Note our exception.

Q. What would be the approximate cost of drilling and equipping another well on the Selby Oil & Gas Company lease, if you know?

A. The price varies according to the material you used, but I would say ten or twelve thousand dollars.

Mr. Hart:
If the Court please, we want to save our same objection, that that is an immaterial question with reference to the issues.

The Court:
I thought that might be material to come in on a question of jurisdiction.

Mr. Hart:
We want to object because it is immaterial even on th issue.

The Court:
All right.

Q. Mr. Parker, the amount of oil that you have testified that would, in your opinion, be drained from the Selby Oil & Gas Company lease by reason of the drilling and production of the second well on the Hastings & Dodson lease, would that amount of oil lost by drainage over the years, that is calculating its value as of this time, exceed in amount the sum of $3,000.00?

A. It would, materially.

Q. Sir?

A. It would materially exceed it.

Q. It would run up to several times $3,000.00?

A. Yes, sir.

98 Q. That is if you undertook to fix its present value, although the oil is to be lost over a period of ten or fifteen years?

A. That is correct. You mean by present value the discounted future value?

Q. Yes, sir.

A. Yes, sir.

Q. What is the price of oil now in the East Texas Oil Field?

A. $1.10.

Q. Is that its reasonable market value over there?

A. Yes, sir.

Re-Cross Examination.

Questions by Mr. Lee:

Q. Mr. Parker, how much oil will this No. 2 well of Hastings & Dodson drain from the Selby Oil & Gas Company lease over the period of the field's life?

A. It will drain its proportionate share.

Q. How much?

A. I haven't worked that out. I dealt in the leases as a whole, Mr. Lee.

Q. All right. Now, you are litigating here with respect to the damage you say it is going to do your client from

this one well. How much oil will this second well of Hastings & Dodson's, the one here involved, drain from Selby Oil & Gas Company and Lewis Production Company's lease over the life of the field?

A. Well, on the basis of the study I made, two wells would drain approximately 60,000, and this well would drain half that amount or 30,000 barrels.

99 Q. How many?

Mr. Moody:

He said 30,000 barrels.

Q. Will it drain all that from the Selby Oil & Gas Company lease?

A. Yes, sir.

Q. What are you going to do with your west-east migration theory then?

A. Well, you would increase the drainage, Mr. Lee, by increasing the quantity of oil that moves into the area. The figures that I made on future recovery were in a measure conservative, I think, but if you increase the amount of oil that comes into the area and the same number of wells remain in the area you have relatively the same proportion of oil moving as I have indicated moves in my study that I have filed here with the Court.

Q. All right, in your study here you have included all the adjoining and surrouding leases?

A. That is correct.

Q. And you have said that this one additional well of Hastings & Dodson's will get about 60,000 barrels more oil there and you say that half of it will be taken by that well and from your tract. Why don't you allocate that among the adjoining leases? Won't they get some of that from their neighbors or will it just beat a path to your door and take at all from your tract?

A. Do you have a map there?

Q. Yes, sir.

A. You will find that the losses come from
100 the Weaver-Crim and the Selby Oil & Gas and the gains come from the leases immediately east of them; and my assumption in the allocation of the drainage as between leases was that the National Oil & Grease Company's tract and the Hastings & Dodson tract would take from the Selby Oil & Gas Company tract in proportion to their gains.

Q. Then how much are you saying that the National Oil & Grease Company tract is going to take from you?

A. The figures stated in my report here.

Q. All right, what does that report show.

A. It would be twenty-four and a fraction per cent, or 19,267 barrels.

Q. How many?

A. 19,267 barrels

Q. What page is that shown on?

A. Page 5.

Q. And Hastings & Dodson are going to take from you 60,000 barrels?

A. That is right.

Q. Well, as Hastings & Dodson produce twenty barrels per day from their wells, and under the west-east theory of migration it is replaced as fast as it comes in there, how are they going to be draining that oil from you when you lay to the east of the Hastings & Dodson?

A Well, it doesn't make any difference whether oil is in place or there is any migration or not, there is a certain amount of oil that comes into the Hastings & Dodson and surrounding leases, and if the Hast-
101 ings & Dodson lease has an advantage over the surrounding leases it is going to get more oil because it has more relative wells under the given allowable.

Q. Is there as much oil in place under those leases as there was when the field was originally discovered?

A. In my estimate I discounted it. I took about sixty per cent instead of taking the one hundred per cent of effective sand.

Q. You think there is about sixty per cent as much now?

A. No, I hardly think so, but I took it on that basis to be conservative. As a matter of fact, I think the drainage would be more than the figures we have here.

Q. Then under that theory the wells are going to produce in there about thirty years, aren't they? Isn't that what you say?

A. No, I said this is for approximately a twelve year period. The probabilities are the field will be producing longer than twelve years.

Q. On a twelve year basis, then, at that time all the oil that is now under Hastings & Dodson's tract would have migrated over onto the Selby tract to the east, wouldn't it?

A. No, I can't see it that way.

Q. Well, how much of Hastings & Dodson's oil is going to migrate to Selby Oil & Gas Company's tract?

A. On the basis of this study, approximately seventy-five per cent of it.

Q. And they in turn are going to have to get theirs from migration from the west?

A. That is about seventy-five per cent.

Q. They are going to have to get theirs, in
102 turn, from somebody else and not Selby, aren't they?

A. Yes, I think that would be true.

Q. There won't be any of Selby's oil migrating westward to the Hastings & Dodson tract, will there?

A. Probably not.

Re-Direct Examination.

Questions by Mr. Moody:

Q. Mr. Parker, do you know what was the average density of drilling in the East Texas field in April, 1940?

A. Slightly in excess of one well to five acres.

Q. About one well to five acres?

A. Yes, sir.

Q. Hastings & Dodson, then, already had their lease drilled below the average density of the entire field?

A. Yes, sir.

Q. And this well would give—

The Court:

They only have one well?

Mr. Moody:

Yes, sir.

Q. With two wells their density would be approximately two and a half times as great as the average density of the field?

A. Approximately, yes, sir.

Re-Cross Examination.

Questions by Mr. Hart:

Q. Mr. Parker, did you estimate how much oil an additional well drilled on the Hastings & Dodson tract would produce from there on?

A. No, sir.

Q. You didn't estimate how much oil that No. 2 well would produce during its life?

A. The remainder of the life of the field, no, sir.

Q. From now on?

A. No, sir.

The Court:

They have them all cut down to about twenty barrels, haven't they?

Mr. Hart:

Yes, sir.

Q. If an additional well is drilled on the Selby Oil & Gas Company's tract it would produce during its producing life about as much oil as this well No. 2 on the Hastings & Dodson tract, wouldn't it?

A. Probably so, but that wouldn't take care of the condition.

Re-Direct Examination.

Questions by Mr. Moody:

Q. Mr. Lee asked you in his last question whether or not there would be any migration of oil from the Selby Oil & Gas Company to the Hastings & Dodson lease, and you said no. Did you mean by that there wouldn't be any drainage?

A. No. There is drainage. You confused migration and drainage, I take it.

Mr. Lee:

I just asked you about migration.

A. There wouldn't be any movement of oil from the Selby tract—I mean the reverse of that—there might be movement of oil or drainage of oil from the Selby to the Hastings & Dodson tract.

The Court:

Unless you have a low pressure here?

A. Yes, sir.

104 The Court:

If you have low pressure it wouldn't go there?

A. Yes, sir, the difference in density, if taken on a lease basis, would tend to cause that low pressure area on the Hastings & Dodson lease, your Honor.

(Witness excused.)

Mr. Hart:
Is this written instrument in evidence?

Mr. Moody:
I am going to offer it in evidence right now. This is his report. If you gentlemen have no objection, I will give you a copy and offer it in evidence.

Mr. Lee:
Your Honor, we are going to object to it.

Mr. Moody:
You object to it?

Mr. Lee:
Yes.

Mr. Moody:
I withdraw the offer, then. That is all.

Mr. Lee:
If the Court please, I don't see any necessity in putting any evidence on in the present condition of the record. I don't think they have made a case justifying the overturning of an order of the Railroad Commission, even without any proof on our part. Now, if the Court thinks otherwise, we are prepared to put on our proof and will do it, but we think that there is absolutely no evidence here to justify this Court in overturning the Railroad Commission order under attack.

Mr. Moody:
May it please the Court, it just occurs to me that I didn't state in our stipulation about Rule 37, and that may be what he has in mind.

Mr. Lee:
No, it is not based on that.

Mr. Moody:

Do you have any objection to the stipulation showing that Rule 37 as promulgated by the Railroad
105 Commission, was in force in April and July, 1939, as alleged in plaintiffs' petition?

Mr. Lee:

Yes, that is all right. I was not basing my position on that ground.

Mr. Hart:

Before that stipulation goes in, I don't know whether the entire rule was pleaded in your complaint.

Mr. Moody.

I just copied certain parts as is shown there in the complaint.

Mr. Hart:

We would like to have it understood that the entire rule be in evidence.

Mr. Moody:

All right.

(The above referred to Rule 37 was thereupon received in evidence, a copy to be furnished by counsel for the Railroad Commission of Texas and such copy to be sent up as an original exhibit; such copy is designated EXHIBIT 8.)

Mr. Lee:

I am not trying to get at any technical ground on that. I just think on the broadest basis you can place the lawsuit that they have not overcome the prima facie validity of that order.

The Court:

Do you gentlemen want to argue that?

Mr. Moody:

Your Honor, I only have a few words to say about it. The testimony before the Court is that the examiner of the Railroad Commission who held the hearing reported to the Commission that the testimony showed there is no net loss of oil to the applicant's lease. That was the testimony before the Railroad Commission; and the Railroad Commission here makes an order in the face of that statement as to the facts before the Commission,
106 and says that the order is granted for the purpose of preventing confiscation of property. Now, the testimony shows that this tract now has substantially the average density of the surrounding leases; that it has produced more oil per acre than the average of the surrounding leases; that it has produced about as much oil as any of them with the exception of the Weaver-Crim lease, and that if this well is permitted to be drilled it would have a greater density than any surrounding lease and a much greater density than the average of the East Texas field. Now, the testimony is without dispute that the drilling of the well would cause drainage to this tract of land from adjoining leases and that the well is not necessary to enable this party to produce its oil. I think that makes a case.

The Court:

My understanding is that the State Courts have, in many instances, granted injunctions of this character. However, what are you going to do with the decision of the Supreme Court in this Rowan & Nichols case in which they practically tell this Court not to substitute its judgment for that of the Commission any more.

Mr. Moody:
I am going to try to get them to reverse that on a motion for rehearing, your Honor.

The Court:
Here is a matter that is confined to the discretion of the Commission: they are supposed to conserve the natural resources of the state, and they have the discretion under the law as to the granting of permits for the drilling of oil wells. They conclude that this tract should have another well on it. I don't see how I can, under that decision, substitute my judgment and discretion
107 for theirs and restrain them by injunction. I think the order should be denied.

Mr. Moody:
Very well, your Honor.

The Court:
You prepare the order.

Mr. Lee:
Yes, sir.

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109 AGREEMENT OF COUNSEL.

We the undersigned Attorneys of Record for Plaintiffs and Defendants in Cause No. 27-Civil Action, styled Selby Oil & Gas Company and Lewis Production Company vs. Railroad Commission of Texas, et al., filed in the United States District Court, Western District of Texas, Austin Division, do hereby agree that the foregoing pages numbered 1 through 43, inclusive, contain and constitute a full, true and correct transcript of all oral evidence introduced upon the trial of the above mentioned cause, together

with the objections and exceptions made and taken in connection with the introduction and exclusion of evidence, and the rulings and remarks of the Court thereon; and agree that said transcript, in duplicate, may be filed as the stenographic statement of evidence in this cause.

We further agree that all documentary evidence introduced upon the trial of this cause is to be sent up in its original form.

This the 11th day of November, 1940.

(S.) DAN MOODY,
Attorney for Plaintiffs.

(S.) JAMES P. HART,
Attorney for Defendants, Railroad Commission of Texas and Commissioners Smith, Thompson & Sadler.

(S.) W. EDWARD LEE,
Attorney for Defendants, O. L. Hastings and C. F. Dodson.

Statement of Evidence. Filed 14th day of November, 1940.

110 CLERK'S CERTIFICATE.

The United States of America,
Western District of Texas.

I, MAXEY HART, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing on 109 pages is a true and correct transcript of proceedings had and orders entered, as therein stated, in Cause No. 27 Civil Action, styled Selby Oil & Gas Company, et al. versus Railroad Commission of Texas, et al., as the same appear on file and of record in this office.

I further certify that said transcript embraces only such pleadings, process and orders as are specified in the joint praecipe filed herein by the parties to the suit.

Witness my official signature and the seal of said District Court, at office in the City of Austin, Texas, this the 15th day of November, A. D. 1940.

MAXEY HART,
(Seal) Clerk of said Court,
By JOE STEINER, Deputy.

[fol. 106] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 27th, 1942

No. 9729

SELBY OIL & GAS COMPANY, et al.,

versus

RAILROAD COMMISSION OF TEXAS, et al.

On this day this cause was called, and, after argument by Dan Moody, Esq., for appellants, and W. Edward Lee, Esq., James D. Smullen, Esq., and Ed Roy Simmons, Esq., for appellees, was submitted to the Court.

[fol. 107] COPY OF OPINION OF THE COURT AND DISSENTING OPINION THERETO OF McCORD, CIRCUIT JUDGE—Filed May 13th, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9729

SELBY OIL & GAS COMPANY et al., Appellants,

versus

RAILROAD COMMISSION OF TEXAS, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(May 13, 1942)

Before Foster, Hutcheson, and McCord, Circuit Judges

HUTCHESON, Circuit Judge:

Exhibiting the requisite diversity, and brought in the appropriate court, the United States District Court of

Travis County, Texas, to hold invalid and cancel an order granting a drilling permit and to enjoin all action under it, the suit presented two claims for relief each resting on a distinct jurisdictional basis. In one of these, a claim that the order deprived plaintiffs of their property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, the jurisdiction was rested on the existence of a federal question. In the other, a statu- [fol. 108] tory suit, under Section 8, Art. 6049 (c), Vernon's Texas Annotated Civil Statutes, 1925, the jurisdiction was rested on diversity of citizenship.[1] In the constitutional suit, it was claimed that the order[2] of the commission was invalid and the result of its granting would be to deprive plaintiffs of their property without due process of law. In the statutory suit, the claim was that the conclusion that the granting of the exception was necessary to prevent confiscation of permit-ee's property, was

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[1] Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362; McMillan v. Railroad Commission of Texas, 51 F. (2d) 400; Gulf Land Co. v. Atlantic Refining Co., 113 F. (2d) 902; Stanolind Oil & Gas Co. v. Ambrose, 118 F. (2d) 847; Sun Oil Co. v. Burford, 124 F. (2d) 467.

[2] "Rule 37. #2 & 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas. Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

"The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property;

"Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2, to be spaced as follows:

#2—150 feet east of the west lines;
130 feet southwest of well No. 1.

"It is Further Ordered that well No. 3 is hereby denied."

not supported by substantial evidence [3] and the order was therefore invalid under the statute. The defenses were, a denial as to the constitutional claim that the grant of the permit was violative of the due process clause, and as to the statutory claim that it was invalid under the statute, and an affirmative plea that the order granting a permit for a second well on the tract, as necessary to prevent the confiscation of property, was supported by substantial evidence.

[fol. 109] Plaintiffs' evidence included testimony upon the constitutional claim that permit-ee, by the drilling of the second well allowed under the permit, would have a production and drainage advantage over each and every lease surrounding it, and upon the statutory claim that permit-ee was not suffering any drainage or damage which would prevent it from recovering all the oil then under the lease and therefore the grant of the permit was not necessary to prevent confiscation of permit-ee's property. At its conclusion defendants offered no evidence but moved for judgment and the colloquy following ensued. The Court: "My understanding is that the State Courts have, in many instances, granted injunctions of this character. However, what are you going to do with the decision of the Supreme Court in this Rowan & Nichols Case in which they practically tell this Court not to substitute its judgment for that of the Commission any more?" Mr. Moody for plaintiff: "I am going to try to get them to reverse that on a motion for rehearing, your Honor." The Court: "Here is a matter that is confined to the discretion of the commission; they are supposed to conserve the natural resources of the state, and they have the discretion under the law as to the granting of permits for the drilling of oil wells. They conclude that this tract should have another well on it. I don't see how I can, under that decision, substitute my judgment and discretion for theirs and restrain them by injunction. I think the order should be denied." Mr. Moody: "Very well, your Honor." The Court: "You prepare the order." Mr. Lee for defendants: "Yes, sir." On July 18, 1940, there was a judgment, denying plaintiffs

[3] 35 Tex. Jur. 712; Gulf Land v. Atlantic Refining Co., 134 Tex. 59; Richey v. Shell Petroleum Co., 128 S. W. (2d) 898; Railroad Commission v. Shell, Supreme Court of Texas, March 11, 1942, — S. W. (2d) —.

the relief they sued for, and they appealed.

In *Sun Oil Company v. Burford*, 124 F. (2d) 467, in which as here, there were two claims, one that there had been a denial of due process, the jurisdiction based upon the presence of a federal question, the other, a suit under the statute, the jurisdiction based on diversity of citizen- [fol. 110] ship, this court on December 29, 1941, purported to find[4] and follow in the *Rowan* and *Nichols* Cases, 310 U. S. 580, 311 U. S. @ 577 and 614, cases dealing not with an exception to Rule 37 but with general proration orders, a *dictum* confining the federal courts, not only in cases where the jurisdiction was, as in *Rowan's* Case, rested solely on a federal question but in cases where there was diversity jurisdiction, to a consideration of violations of the federal constitution, and prohibiting the federal court of Travis County from entertaining the jurisdiction conferred upon the courts of Travis County by the Texas statute.[5]

Because of the decision of our court in the *Burford* Case rendered since the appeal was taken, appellees insist here that the appeal must be determined not as an appeal from the order on the statutory action, but simply and entirely as an appeal from the claim asserted on constitutional grounds. Appellants, on their part, urge; that the *Burford* Case was, in that respect, wrongly decided; that the Su-

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[4] "However in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have said all issues other than questions under the Federal Constitution should be relegated to the State court, as was found by the court below." 124 F. (2d) 469.

[5] This jurisdiction so conferred has been uniformly exercised in the federal court for the Western District of Texas since 1894, when the Supreme Court of the United States in the Reagan Case, Note 1, supra, sustained a suit brought in the Travis County Division, Western District of Texas against the Railroad Commission of Texas, saying that that court was a court of competent jurisdiction in Travis County, Texas, and where there was the requisite diversity, plaintiff could maintain his suit against the commission there.

preme Court in the *Rowan* and *Nichols* Case, where there was no diversity, jurisdiction being based entirely on a federal question, did not determine, it could not have determined that the Federal District Court of Travis County was without jurisdiction where there was the requisite diversity to hear and grant relief in a suit brought under the Texas statute. We agree with appellants. In *Magnolia Petroleum Co. v. Blankenship*, 85 F. (2d) 537, and again in *Gulf Land Co. v. Atlantic Refining Co.*, 113 [fol. 111] F. (2d) 902, we clearly pointed out the distinction between the Texas statutory suit and a suit for equitable relief on federal constitutional grounds.

In the first *Rowan* Case, 310 U. S. 580, the court said: "*Except where the jurisdiction rests, as it does not here, on diversity of citizenship*, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the due process clause may place upon the exercise of the state's regulatory powers." (Italics supplied.) Thus, when in denying the motion for rehearing, in that case, it declared, 311 U. S. @ 615: "The court below also erred in holding the order a violation of the Texas statute requiring proration on a reasonable basis. In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts", the court was talking not about persons having the requisite diversity and suing under the statute but about Rowan and Nichols who were citizens of Texas and therefore must, if they brought the statutory action fixed by the statute in Travis County, bring it in the state court of that county. Further, when on the same page the court said, "but in any event as we read the Texas cases, the standard of reasonable basis under the statute opens the same range of inquiry as the respondent in effect asserted to exist in his claims under the due process clause. These later claims we have found untenable. What ought not to be done by the federal courts when the due process clause is invoked, ought not be attempted by these courts under the guise of enforcing a state statute", the court was not dealing with the state statutory suit to review the commission's order brought in the federal court of Travis County, under the authority of the Texas statute providing for such review. It was dealing with the claim of Rowan and Nichols, citizens of

Texas, advanced in their suit for the extraordinary relief [fol. 112] of injunction on the federal constitutional ground that the commission's order had violated the Texas statute requiring proration on a reasonable basis and not being in accordance with the statute had deprived them of due process. What is in question here in the statutory phase of the suit is a very different thing. This is, whether, under the rules established by the Texas courts, the order of the commission granting an exception to its Rule 37, to prevent confiscation, is supported by reasonable evidence. The Texas decisions are clear that whether the exception to the rule is granted for confiscation or for waste, a litigant in the statutory suit is entitled to have the independent judgment of the trial court based, not of course upon the evidence offered before the commission,—that is wholly immaterial—, but upon the evidence offered on the trial as to whether the order rests upon a reasonable basis, that is whether it is supported by substantial evidence.

Under these authorities it was the duty of the trial court not only to determine whether plaintiffs in their constitutional suit showed confiscation in violation of the Fourteenth Amendment, but also to determine whether they had prevailed upon their claim in their statutory suit, that the order granting an exception to prevent confiscation was unsupported by substantial evidence. It was its duty too, under Rule 52, Rules of Civil Procedure, to make findings. "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon." By the course this case took below, plaintiffs and this court were deprived of the judgment of the trial judge on the facts, and they and we have been deprived of the benefit of his findings. Because this is so, this court will not undertake to determine the issues on their merits for itself, but will reverse the cause and remand it to the district court for a retrial and for further proceedings not inconsistent herewith.

[fol. 113] McCord, Circuit Judge, Dissenting:

I have no quarrel with the opinion of my brothers in this case. In a clear and logical manner the opinion succinctly states the law as I think it should be applied in

cases of this kind where jurisdiction of the federal court is invoked by reason of the diversity of citizenship of the parties. However, the language and implication of the Supreme Court opinions in the *Rowan & Nichols* Case have given rise to no little doubt and confusion as to the proper method of disposing of cases involving the conservation laws of a state. In *Sun Oil Company v. Burford*, 124 F. 2d 467, a conservation case involving an order of the Railroad Commission of Texas, jurisdiction was alleged to exist both because of diversity of citizenship and the presence of a federal question. In disposing of the case this court, in an opinion by Judge Dawkins, said that "in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have said all issues other than questions under *under* the Federal Constitution should be relegated to the State court, as was found by the court below." I think that this recent opinion in the *Sun Oil Company* Case should be adhered to, and that we should not change face and position until the Supreme Court has considered the point and finally clarified the issue.

I respectfully dissent.

[fol. 114] JUDGMENT

Extract from the Minutes of May 13th, 1942

No. 9729

SELBY OIL & GAS COMPANY, et al.,

versus

RAILROAD COMMISSION OF TEXAS, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded

to the said District Court for a retrial and for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, Railroad Commission of Texas, and others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"McCord, Circuit Judge, dissents."

[fols. 115-117] PETITION OF APPELLEES HASTINGS AND DODSON FOR REHEARING—Filed June 1, 1942

No. 9729

In the

United States Circuit Court of Appeals

FIFTH CIRCUIT

SHELBY OIL & GAS COMPANY, ET AL.,
Appellants,

v.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellees.

Appeal from the District Court of the United States, for the Western District of Texas

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PETITION OF APPELLEES HASTINGS AND DODSON FOR REHEARING

To Said Honorable Court:

Now come appellees O. L. Hastings and C. F. Dodson and petition the court to set aside its opinion and judgment rendered and entered herein on May 13, 1942, reversing the judgment of the trial court and remanding this cause for retrial and further proceedings not inconsistent with said opinion, and to grant them a rehearing and on rehearing to render and enter judgment affirming the judgment of the trial court. As grounds therefor the following are presented and relied upon.

First Ground

The decision in this case is contrary to and in conflict with the opinions of the Supreme Court in the *Rowan & Nichols cases, 310 U. S. 573, 311 U. S. 614 (on rehearing);* and *311 U. S. 570.*

Second Ground

The court erred in overruling its prior recent opinion in the case of *Sun Oil Company v. Burford, 124 Fed. (2d) 467,* which opinion in holding

> "• • •*in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court* appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have *said all issues other than questions under the Federal Constitution should be relegated to the State Court* • • •." (Italics ours.)

correctly interpreted and followed the holdings of the Supreme Court in the *Rowan & Nichols cases.*

This petition is filed under the belief there are good grounds to support it, is not interposed for the purpose of delay, and is not intended as harassment to appellants. Supporting argument is therefore submitted, under separate cover, of which petitioners pray this court's consideration.

Attorneys for appellants are Honorable Dan Moody, Norwood Building, Austin, Texas, and Mr. E. R. Hastings, Tulsa, Oklahoma; and the attorney for all other appellees is Honorable Gerald C. Mann, Attorney General of Texas,

Austin, Texas. Copies of this petition have been delivered to each of said attorneys.

WHEREFORE, premises considered, these petitioners pray that the opinion and judgment of this court rendered and entered on May 13, 1942, be set aside and that these petitioners be granted a rehearing, and on rehearing that the court render and enter judgment affirming the judgment of the trial court, and that they have their costs and other relief to which they are entitled.

Respectfully submitted,

EARLE B. MAYFIELD *and*
W. EDWARD LEE,
1400 Peoples Bank Building,
Tyler, Texas,
Attorneys for Petitioners, O. L. Hastings and C. F. Dodson.

W. EDWARD LEE,
Of Counsel

[fols. 118-121] PETITION FOR REHEARING OF RAILROAD COMMISSION OF TEXAS, APPELLEE—Filed June 1, 1942

No. 9729

United States Circuit Court of Appeals

FIFTH CIRCUIT

SELBY OIL AND GAS COMPANY ET AL
Appellants

v.

RAILROAD COMMISSION OF TEXAS, ET AL
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

APPELLEES' PETITION FOR REHEARING AND SUPPORTING ARGUMENT

To the Honorable Judges of the United States Circuit Court of Appeals:

The Railroad Commission of Texas, one of the appellees in the above styled and numbered cause, respectfully presents this its petition for rehearing and in support thereof submits the following grounds:

1

This Court erred in holding that where jurisdiction rests on diversity of citizenship in cases involving the conservation of the State's natural resources that Federal Courts will pass on issues arising

under state law under the provisions of Section 8 of Article 6049c, Vernon's Texas Annotated Civil Statutes.

2.

This court erred in overruling its very recent opinion in the case of Sun Oil Company v. Burford, et al., 124 Fed. (2d) 467, which opinion correctly interprets and follows the opinions of the Supreme Court in the Rowan and Nichols cases, 310 U. S. 573, 311 U. S. 614 (on rehearing); and 311 U. S. 570.

3.

This court erred in holding that the United States District Court sitting in Travis County, Texas, was authorized to substitute its judgment for that of the Railroad Commission on the question of the necessity for the exception to the Commission's spacing rule involved herein to prevent confiscation of property.

4.

This court erred in holding that the United States District Court erred in failing to file findings of fact and conclusions of law herein, said District Court having sustained appellees' motion for judgment at the completion of appellants' case.

5.

In the event this court is correct in holding that the trial court erred in failing to file findings of fact and conclusions of law herein then this court erred in failing to find that such error of the trial court, in the state of the record in this case, was harmless.

6.

If this court is correct in its holding that the trial court had jurisdiction to pass on issues arising under State law, then this court erred in failing to hold that as a matter of law appellants failed to overcome the prima facie validity of the commission's permit order in suit.

7.

If this court is correct in its holding that the trial court could pass on issues of fact arising under State law, then this court erred in failing to hold that appellants own evidence proved as a matter of law that the permit order in suit was reasonably supported by substantial evidence.

8.

This court erred in failing to hold that appellants wholly failed to make a prima facie case on their claim that the order in suit deprived them of their property without due process of law in violation of

the fourteenth amendment to the Federad Constitution.

Appellee, The Railroad Commission of Texas, prays that this petition for rehearing be granted and that the former judgment of the Court be vacated and that the judgment of the District Court be affirmed.

Respectfully submitted,

GERALD C. MANN
Attorney General of Texas
GROVER SELLERS
CECIL C. ROTSCH

JAMES D. SMULLEN

ED ROY SIMMONS
Assistant Attorneys General
Attorneys for Appellee
Railroad Commission of Texas

I, ED ROY SIMMONS, an attorney of record for appellee, The Railroad Commission of Texas in this cause DO HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

WITNESS MY HAND this 30th day of May A. D. 1942.

ED ROY SIMMONS

[fol. 122] ORDER DENYING REHEARINGS

Extract from the Minutes of June 30th, 1942

No. 9729

SELBY OIL & GAS COMPANY, et al.,

versus

RAILROAD COMMISSION OF TEXAS, et al.

It is ordered by the Court that the petitions for rehearing filed in this cause be, and the same are hereby, denied.

[fol. 123] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 124] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

O. L. HASTINGS, et al., Petitioners,

vs.

SELBY OIL AND GAS COMPANY, et al.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioners,

It Is Ordered that the time for filing petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including November 14, 1942.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of September, 1942.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 528

ORDER ALLOWING CERTIORARI—Filed December 14, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 495.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL.,

Petitioners,

vs.

SELBY OIL AND GAS COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF THEREON.

GERALD C. MANN,
Attorney General of Texas;
E. R. SIMMONS,
JAMES D. SMULLEN,
Assistant Attorneys General,
Counsel for Petitioner
Railroad Commission of Texas
and Its Members;
W. EDWARD LEE,
JOHN PORTER,
Counsel for Petitioners O. L.
Hastings and C. P. Dodson.

INDEX.

Subject Index.

Cases Cited.

STATUTE CITED.

TEXT CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL.,

Petitioners,

vs.

SELBY OIL AND GAS COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF THEREON.

To Said Honorable Court:

The Attorney General of the State of Texas on behalf of the Texas Railroad Commission, and O. L. Hastings and C. F. Dodson on their own behalf, pray that a Writ of Certiorari issue to review the final judgment and decision of the United States Circuit Court of Appeals for the Fifth Circuit entered on May 13, 1942 (R. 112), in Cause No. 9729 on the docket of said Court, reversing the judgment of the United States District Court for the Western District of Texas (R. 49-50), and remanding said cause for trial. Peti-

tions for rehearing were duly filed and overruled and denied, without further opinion, on June 30, 1942 (R. 121). This petition is filed pursuant to Act of February 13, 1925, and within the extended time granted by an order entered by Mr. Justice Douglas, upon application, dated September 25, 1942, on which jurisdiction rests.

Petitioners Hastings and Dodson are resident citizens of the State of Texas. The Railroad Commission of Texas is a department of executive agency of the government of the State of Texas and as such is authorized to sue and be sued. It maintains its offices and its members reside in the State of Texas.

Respondent, Selby Oil & Gas Company, is a corporation duly organized and existing under the laws of the State of Delaware and is a citizen of said State. Respondent, Lewis Production Company, is a corporation duly organized and existing under and pursuant to the laws of the State of Pennsylvania, and is a citizen of said State.

Statement of the Matters Involved.

Respondents, as plaintiffs below and as appellants in the Fifth Circuit Court of Appeals, instituted this suit by filing petition in the United States District Court for the Western District of Texas on July 17, 1939 (R. 4-13), for the purpose of setting aside a permit granted by the Railroad Commission of Texas (R. 12, 71), to Hastings and Dodson, authorizing the drilling of Well No. 2 on a 3.85-acre tract of land out of the Mary Cogswell Survey, Rusk County, Texas, and to enjoin production therefrom (R. 4-13). Jurisdiction was predicated upon (a) diversity of citizenship, and (b) the alleged violation of rights vouched respondents by the Fourteenth Amendment to the Federal Constitution. Issue joined on a trial to the Court without a jury. Respondents

offered evidence (R. 60-101), and at the close of respondents' evidence petitioners moved for judgment (R. 100) which was allowed, and they offered no evidence. Judgment was for petitioners as defendants (R. 50), and respondents gave notice of and perfected their appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 51).

The judgment of the trial court was reversed by the Circuit Court of Appeals and the cause remanded for trial (R. 112). See *Selby Oil & Gas Company, et al.*, v. *Railroad Commission of Texas, et al.*, 128 F. (2d) 334-337, and (R. 106-112) for the Court's holding.

Petitions for rehearing were duly filed (R. 114, 117) and denied without written opinion on June 30, 1942 (R. 121).

Upon proper application, Mr. Justice Douglas of this Court entered an order under date of September 25, 1942, extending the time for filing Petition for Certiorari herein to and including November 14, 1942.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347). For the importance of the issuance of the writ see "Reasons Relied On" to follow.

Questions Presented.

1. Whether a Federal District Court may pass upon issues arising under State law in cases involving the conservation of a State's natural resources where jurisdiction is predicated in part upon the diversity of citizenship; and thus whether the Circuit Court of Appeals erred in refusing

to affirm the judgment of the Federal District Court relegating respondents to their remedy in the State courts.

2. Whether the Circuit Court of Appeals erred in directing the Federal District Court to substitute its judgment for that of a state executive agency authorized to administer a state's conservation laws when jurisdiction rests in part on diversity of citizenship.

3. Whether the respondents, Selby Oil and Gas Company and Lewis Production Company, discharged the burden of proving the illegality of the administrative order of the Texas Railroad Commission; and thus whether respondents, by their evidence, overcame the prima facie validity of the administrative order involved.

4. Whether if the Circuit Court of Appeals did not err in directing the Federal District Court to pass upon issues arising under a state's conservation laws, it nevertheless erred in declining to hold that, as a matter of law, the order involved was reasonably supported by substantial evidence.

5. Whether the Circuit Court of Appeals erred in holding that a Federal District Court is required to file findings when a motion for judgment that plaintiff had not made out a case is sustained at the conclusion of plaintiff's evidence.

Reasons Why Writ Should Be Allowed.

1. The decision of the Circuit Court of Appeals in this case is contrary to and in direct conflict with the opinions of this Court in the *Rowan* and *Nichols* cases, 310 U. S. 573, 311 U. S. 614, (On rehearing); and 311 U. S. 370.

2. The opinion of the Circuit Court of Appeals in this case (128 F. (2d) 334) is in direct conflict with each of

its opinions in *Sun Oil Company* v. *Burford*, (124 F. (2d) 467, 130 F. (2d) 10), decided at the same term of court.

3. The United States Circuit Court of Appeals for the Fifth Circuit has decided a question of procedural law of momentous importance to maintenance of harmony between state and federal courts by holding that the United States District Court was empowered to adjudicate matters involving a state's conservation of its natural resources.

4. The language of the opinion of the Circuit Court of Appeals in this case conflicts with the language of the Texas Supreme Court in *Railroad Commission* v. *Shell*, (Texas Sup. Ct.) 161 S. W. (2d) 1022, in the pronouncement of the applicable local law in cases involving the conservation of the State's natural resources.

5. Nothing is of more importance to the people of Texas than the assurance of proper adjective and substantive rules of law respecting the conservation of their great oil reserves. The three opinions of the Circuit Court of Appeals (124 F. (2d) 467, 128 F. (2d) 334, 130 F. (2d) 10), have placed these rules in utter and hopeless confusion.

Wherefore, petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Honorable Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the cause entitled *Selby Oil & Gas Company, et al., Appellants*, v. *Railroad Commission of Texas, et al., Appellees*, numbered 9729 on the Docket of said Court to the end that the judgment and decree of said Circuit Court of Appeals in said cause may be reversed by this Honorable

Court and the judgment of the United States District Court affirmed, and that petitioners have such other and further relief as may seem meet and just.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL.,

Petitioners,

vs.

SELBY OIL AND GAS COMPANY, ET AL.,

Respondents.

BRIEF FOR PETITIONERS.

To the Honorable Supreme Court of the United States:

Petitioners respectfully present this their brief in support of petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported as *Selby Oil & Gas Company, et al.*, v. *Railroad Commission of Texas, et al.*, in 128 Fed. (2d) and appears in the record at pages 106-112.

Jurisdiction.

The judgment and decree to be reviewed was rendered by the Fifth Circuit Court of Appeals on May 13, 1942

(R. 112). Petitioners duly filed their respective petitions for rehearing (R. 114, 117). The petitions were each overruled, without written opinion, on June 30, 1942 (R. 121). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 (a)).

The Facts.

In Texas, Jurisprudence cases such as the instant one are known as "Rule 37" cases. Rule 37 is the rule governing the spacing of wells in the oil fields of Texas promulgated by the Texas Railroad Commission. No well may be drilled in Texas unless it can be drilled in conformity to the rule; or under one of the exceptions provided in the rule "to prevent confiscation of property" or to "prevent physical waste." See *Gulf Land Company* v. *Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73, for statement of the rule.

On July 5, 1939, the Texas Railroad Commission, after notice and hearing, granted petitioners, Hastings and Dodson, permit to drill an oil well in Rusk County, Texas (R. 12, 71) under the exception to the spacing rule "to prevent confiscation of property."

Respondents, as plaintiffs in the Federal District Court, instituted suit to set aside and cancel this permit on July 17, 1939 (R. 13). Upon a trial had before the Court without a jury, the Court sustained a motion for judgment for the defendants at the conclusion of plaintiffs' evidence (R. 101-103). Petitioners, defendants below, offered no evidence. Respondents thereupon gave notice of appeal to the Circuit Court of Appeals for the Fifth Circuit (R. 51).

The judgment of the trial court was reversed by the Circuit Court of Appeals and the cause remanded for a new trial (R. 112). See *Selby Oil and Gas Company, et al.*, v.

Railroad Commission of Texas, et al., 128 Fed. (2d) 334-337, and R. 106-112, for the Court's opinion.

Petitions for rehearing were duly filed (R. 114, 117) and denied without written opinions on June 30, 1942 (R. 121).

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the United States District Court must determine the validity under the Texas law of an order of the Texas Railroad Commission granted after notice and hearing permitting the drilling of an oil well for the purpose of preventing "confiscation of property" or drainage of oil by other wells in the vicinity.

2. In holding that the United States District Court must exercise an "independent judgment" on the fact issue of drainage or confiscation; and thereby in holding that a Federal District Court may substitute its judgment on the fact issue of drainage for that of the Texas Railroad Commission.

3. In holding that the Federal District Court erred in holding that respondents, Selby Oil and Gas Company and Lewis Production Company, failed to discharge the burden of proving the illegality of the order of the Texas Railroad Commission permitting the drilling of the well in question; and in holding that respondents have failed, by their evidence, to overcome the prima facie validity of the order.

4. In declining to hold that as a matter of law the administrative order involved was reasonable supported by substantial evidence.

5. In holding that a Federal District Judge must file findings of fact when he sustains a motion for judgment at the conclusion of the plaintiff's evidence.

Point I.

(Germane to Specification of Errors 1 and 2, and Questions Presented 1 and 2.)

The holdings in this case by the Circuit Court of Appeals being in conflict with the opinions of this Court in the Rowan & Nichols cases, and the language of this case being in conflict with the language in the Sun-Burford case; and the questions involved being of great importance to the procedure by a State in conserving its natural resources, this Court should eliminate the conflict and make certain and definite the procedure to be followed.

Statement Under Point I.

Upon the trial of the cause in the Federal District Court one expert witness, a petroleum engineer, testified for plaintiffs, respondents herein (R. 72-99). He testified that he had made a study of the East Texas Oil Field and the lease in question (R. 72); he testified concerning the sand thickness in the area (R. 72); and that he had made calculations as to the recoverable oil beneath the lease in suit and surrounding leases (R. 73); that in making these calculations he took into consideration the sand thickness, the probable recovery factor and shrinkage due to the difference in volume of oil in the sand and the pressure and temperature existing in the sand, and the pressure and temperature existing on the surface (R. 73-74). He further estimated the probable producing life of the wells in the area (R. 74) and undertook on his estimate of reserves to allocate a certain portion of oil to each tract in the area based on acreage; he further calculated the amount of oil that would be drained by the well in suit, based upon his estimate of reserves and the production allowable (R. 77); he further detailed the density of wells

on the various tracts (R. 80-82); and the amount of past production (R. 85-86). Based upon the figures and estimates given, the witness offered his opinion that the well was not necessary to prevent drainage of oil from petitioners' lease.

On cross-examination, however, the witness admitted that it was his opinion that petitioners' tract was at a 37½% disadvantage in density of drilling when compared with the eight times area surrounding (R. 92).

Upon this evidence the trial court sustained a motion for judgment presented by the defendants holding that in his opinion he was precluded by the *Rowan* and *Nichols* cases from substituting his judgment and discretion on the question of drainage for that of the Texas Railroad Commission (R. 102-103).

Authorities Under Point I.

Railroad Commission of Texas v. *Rowan and Nichols Oil Company*, 310 U. S. 573;

Railroad Commission of Texas v. *Rowan and Nichols Oil Company* (on rehearing), 311 U. S. 614;

Railroad Commission of Texas v. *Rowan and Nichols Oil Company*, 311 U. S. 570;

Selby Oil & Gas Company v. *Railroad Commission of Texas*, 128 Fed. (2d) 10;

Railroad Commission of Texas v. *Pullman Company*, 312 U. S. 496, 61 S. Ct. 643;

Chicago v. *Fieldcrest Dairies*, — U. S. —, 62 S. Ct. 986.

Argument under Point I

In this case, the majority opinion of the Circuit Court held that the Federal District Court was empowered, and it was its consequent duty, not only to determine whether plaintiffs showed confiscation in violation of the Fourteenth

Amendment, but also to determine whether, upon their claim in their statutory suit, the attacked order of the Commission was supported by substantial evidence, and as to this that the trial court must exercise an "independent judgment." Thus the cause was reversed and remanded for a new trial. The dissenting opinion stated that this Court's opinions in the *Rowan and Nichols* cases had given rise to no little doubt and confusion as to the proper method of disposing of cases involving the conservation laws of a state, but thought the circuit court should not change face and position to that taken by it in the first *Sun-Burford* opinion until this Court had considered the point and finally clarified the issue (128 F. (2d) 337). The judge who dissented in this case specially concurred in that Court's second opinion in the *Sun-Burford* case; thus changing "face and position" before this Court had asserted any change of its holding in the *Rowan and Nichols* cases (130 F. (2d) 18).

In order to more sharply focus the alleged conflict, indulgence is prayed to quote brief excerpts from this Court's opinions in the *Rowan and Nichols* cases. In the first case, the Court said:

> "Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary" (310 U. S. 580).

After discussing factual matters presented, it further held that:

> "Plainly these are not issues for our arbitrament" (310 U. S. 583).

and

> "It is not for the Federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better" (310 U. S. 584).

On rehearing it said that:

> "What ought not to be done by the Federal courts when the due process clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute" (311 U. S. 615).

In the second *Rowan & Nichols* case, it was said that:

> "We rejected these arguments as an attempt to substitute a judicial judgment for the expert process invented by the state in a field so peculiarly dependent on specialized judgment" (311 U. S. 573).

Further holding that:

> "• • • a state's interest in the conservation and exploitation of a primary natural resource is not to be achieved through assumption by the federal courts of powers plainly outside their province and no less plainly beyond their special competence" (311 U. S. 577).

And concluding, said:

> "In denying the petition for rehearing in earlier cases we held that *whatever rights the state statute may afford are to be pursued* in the state courts" (311 U. S. 577). (Emphasis supplied.)

In the original opinion in the first *Rowan and Nichols* case, this Court held that:

> "Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a Federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the due process clause may place upon the exercise of the state's regulatory power" (311 U. S. 614).

It plainly appeared from the last quoted language that an exception was made where jurisdiction was invoked on grounds of diversity. Deleting this sentence on rehearing,

the Court added that what ought not to be done when the due process clause is invoked ought not to be attempted under the guise of enforcing a state statute, and indicated in the closing sentence that the remedy rested in the state courts.

As basis for the Circuit Court's opinion in this case, it quoted the sentence which this Court deleted from its original opinion in the first *Rowan and Nichols* case (128 F. (2d) 336), and held that since diversity was not invoked in the *Rowan and Nichols* cases, this Court could not lay down a rule applicable where jurisdiction was invoked on diversity. It appears to us that this Court deliberately deleted the exception first made in favor of diversity and laid down a rule applicable to all litigation where a state statutory remedy is invoked.

As showing conflict between this case and the *Sun-Burford* case, the Circuit Court held in this there were two suits, one invoking the due process clause, and the other a state statutory suit (128 F. (2d) 335). In the *Sun-Burford* case, the same court held in a like proceeding that there were not two suits, one "constitutional" and the other state statutory (130 F. (2d) 16). In construing this Court's opinions in the *Rowan and Nichols* cases, the Circuit Court held in the *Sun-Burford* case that "federal courts should not substitute their judgment for that of the Commission" (130 F. (2d) 14); whereas in this case the Circuit Court held that the Federal District Court could exercise "independent judgment" as to whether an order of the Commission was supported by substantial evidence (128 F. (2d) 337).

It thus plainly appears that private litigants and the Railroad Commission of Texas do not know, and cannot know, their rights in respect to this and related matters unless and until this Court eliminates the conflict and either reannounces its former holdings or recedes therefrom and restates them.

If ever there existed any doubt as to the meaning of the plain language of this Court in the *Rowan and Nichols* cases, that doubt was certainly removed by the opinions of this Court in *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, 61 S. Ct. 643; and *Chicago* v. *Fieldcrest Dairies*, — U. S. —, 62 S. Ct. 986.

Thus, the Fifth Circuit Court of Appeals was right in relegating to the State courts for determination issues other than questions under the Federal Constitution in cases arising from the enforcement of a state's conservation law, (*Sun Oil Company* v. *Burford*, 124 Fed. (2d) 467); and wrong in departing from that practice in its subsequent opinions, (128 Fed. (2d) 334; 130 Fed. (2d) 10.) We pray that this Court settle the hopeless confusion now existing in the opinions of the Fifth Circuit Court of Appeals and once again set forth the law to the satisfaction of that Court that whatever rights a state statute may afford in conservation cases "are to be pursued in the state courts."

Point II.

(Germane to Specification of Errors 3 and 4, and Questions Presented 3 and 4)

The validity of the permit in suit was established as a matter of law by the testimony of respondents own witness in the trial court under State law as enunciated in the opinions and judgments of Texas Courts.

Authorities Under Point II.

Magnolia Petroleum Company v. *Railroad Commission*, (TCA, 1939) 127 S. W. (2d) 223;

Gulf Land Company v. *Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73;

Railroad Commission v. *Shell Oil Company*, 161 S. W. (2d) 1022.

Statement and Argument.

The plaintiffs offered but one expert witness. The character of testimony he gave is detailed under Point I and is adopted here. Upon cross-examination, he admitted that the tract in suit was at a 37½% disadvantage as compared with an area eight times its size surrounding it (R. 92).

The instant permit was granted as an exception to the well spacing rule "to prevent confiscation of property". As stated by the Texas Supreme Court in *Gulf Land Company* v. *Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73, "the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas under his land or their equivalents in kind. It is evident that the word refers principally to drainage."

And in *Magnolia Petroleum Company* v. *Railroad Commission*, (TCA, 1939) 127 S. W. (2d) 223, writ of error denied by the Supreme Court, the Court stated the method generally used in this State in determining drainage advantage or disadvantage:

> "The method generally applied in determining whether a tract in question is at a drainage disadvantage, or, to put it differently, whether the owners thereof are given an equal opportunity with lessees of the surrounding properties to recover their fair share of oil in place beneath such tract, is to compare the density and location of wells on such tract with those on the surrounding 8 times area."

The respondents own witness and the only one to testify before the District Court stated that in his opinion the tract in suit was at a density disadvantage of 37½% when compared with the eight times area surrounding. Under the local Texas law a permit must be sustained if it be reasonably supported by substantial evidence. *Railroad Com-*

mission v. *Shell Oil Company*, 161 S. W. (2d) 1022. It is obvious that the permit in suit was so supported and that the Circuit Court of Appeals erred in declining to affirm the trial court's judgment for the defendants, petitioners here, given upon motion for judgment at the conclusion of the plaintiffs' evidence and this even if the Circuit Court of Appeals was correct in its interpretation of the *Rowan and Nichols* cases.

Point III

(Germane to Specification of Errors 5 and Questions Presented 5).

The Trial Court having granted defendants' motion for judgment at the completion of plaintiffs' case was not required to file findings of fact as the question of whether or not plaintiffs' evidence was sufficient to make out a prima facie case was one of law.

Statement.

One of the reasons for reversal given by the Circuit Court of Appeals was that the trial court failed to make findings as contemplated by Rule 52 of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723c.

It will be recalled that in this case the trial court sustained defendants' motion for judgment at the conclusion of plaintiffs' evidence and that defendants offered no evidence.

Authorities.

18 Hughes Federal Practice, Sections 24531-24572;

City of St. Louis v. *Western Union Telegraph Company*, 148 U. S. 92, 37 L. Ed. 380;

McLaughlin v. *Pacific Lumber Company*, 293 U. S. 351, 79 L. Ed. 423;

Coler v. *City of Cleburne*, 131 U. S. 162, 9 S. C. 720;
Dunsmuir v. *Scott*, 217 Fed. 200;
George A. Fuller Company v. *Brown*, 15 F. (2d) 672;
Griffin v. *Thompson*, 10 F. (2d) 127;
Thomas v. *Peyser*, 118 F. (2d) 369;
Tulsa City Lines v. *Maims*, (C. C. A. Okl.-1940) 107 F. (2d) 377;
Article 6049c, Vernon's Annotated Texas Civil Statutes.

Under the federal statutes prior to the adoption of the rules of practice and procedure the option lay with the trial court in a non-jury case to make special or general findings. U. S. C., Title 28, Sections 773, 875. However, numerous decisions announced that unless special findings were made an appellate court would not look at the evidence to determine its sufficiency to support the judgment or a ruling of the Court. Rule 52 (a) of the rules governing practice and procedure in the Federal Courts, provides, in part:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of facts and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review."

Other than to make special findings obligatory, rather than optional, and to obviate the necessity of counsel requesting special findings, we do not understand that the new Rule 52 has changed the prior practice. See *1B Hughes Federal Practice*, Sections 24531-24572.

Under the prior practice there existed one well recognized instance when the appellate court would examine the evi-

dence even in the absence of special findings and that was where a party moved for a judgment in his favor at the conclusion of the opposing party's evidence or upon the whole case. The question there being one of law rather than fact, the appellate court would examine the evidence to determine the propriety of the Court's ruling. *City of St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92, 37 L. Ed. 380; *McLaughlin* v. *Pacific Lumber Company*, 293 U. S. 351, 79 L. Ed. 423; *Coler* v. *City of Cleburne*, 131 U. S. 162, 9 S. C. 720; *Dunsmuir* v. *Scott*, 217 Fed. 200; *George A. Fuller Company* v. *Brown*, 15 F. (2d) 672. As the Court said in *Griffin* v. *Thompson*, 10 F. (2d) 127:

> "Error is also assigned to refusal of the court to make special findings of fact and of law. This was within the discretion of the court and not error, but, as a motion for judgment was made by the defendant the whole case is before us on the facts and law."

In the present case the court sustained defendants' motion for judgment at the conclusion of the plaintiffs' evidence and it was plainly the duty of the Circuit Court to look at the evidence in order to pass upon the Court's ruling that the plaintiff had failed to establish a prima facie case.

In *Thomas* v. *Peyser*, 118 F. (2d) 369, the Court held Rule 52 (a) inapplicable where facts are admitted by the defendant filing a motion to dismiss, saying:

> "Obviously there need be no fact findings where facts are not in issue. The only issues determined by the trial court were questions of law."

The question presented in the instant case by the Court's ruling upon the defendants' motion for judgment at the conclusion of the plaintiffs' evidence being one of law, Rule 52 (a) is inapplicable and the Court erred in declining to pass upon the question properly presented to it.

Moreover, even if we should be in error and it should be held that Rule 52 (a) must be complied with when a motion for judgment is made by a defendant at the conclusion of the plaintiffs' case and is sustained by the trial court; nevertheless, the purpose of the rule is to aid the reviewing court by according it a clear understanding of the basis of the decision of the trial court. *Tulsa City Lines* v. *Maims*, (C. C. A. Okla., 1940) 107 F. (2d) 377. Surely in the instant case the Court properly understood the basis of the trial court's decision.

Conclusion and Prayer.

We respectfully submit that the opinion of the Circuit Court is squarely in conflict with those of this Court in the Rowan and Nichols cases; that the Circuit Court was unwarranted in departing from its recent decision in the Sun Oil Company case; and that even if the Court was warranted in its change of opinion, nevertheless the respondents wholly failed to establish a case under the Fourteenth Amendment to the Federal Constitution or under Section 8 of Article 6049c, Vernon's Annotated Texas Civil Statutes.*

This case presents important questions pertaining to the jurisdiction and practice of Federal Courts which should be settled by this Court in order to avoid the utmost confusion

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* "Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such rule, law, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

which has arisen by virtue of the conflicting decisions of the Circuit Court of Appeals. For reasons stated, therefore, it is respectfully submitted that this petition for Writ of Certiorari be granted.

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(3155)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL.,
Petitioners,

v.

SELBY OIL AND GAS COMPANY, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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FIRM FOUNDATION—AUSTIN

INDEX

Subject Index

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES—Continued

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REPLY BRIEF FOR PETITIONERS

To the Honorable Supreme Court of the United States:

Petitoners cannot allow to go unchallenged certain statements of law and fact contained in respondents' brief. Hence we take the liberty of filing a reply brief as permitted by Rule 27 of this Court.

REPLY TO RESPONDENTS' STATEMENT OF THE NATURE OF THE CASE

Respondents state in their brief (p. 3) that the trial court sustained Petitioners' motion for judgment "upon the theory that cases of this character

are not cognizable in the Federal courts." (R., 102-103, 108-109).

It is true that the court by remarks during the trial entertained doubt that he could substitute his judgment and discretion for that of the Texas Railroad Commission as to the necessity of another well and that he referred to the *Rowan & Nichols cases.* (310 U. S. 573; 311 U. S. 614; 311 U. S. 370). Be that as it may, the court filed no opinion and in granting petitioners (defendants there) a judgment he was acting upon a motion for judgment at the conclusion of respondents' (plaintiffs there) evidence that "there is absolutely no evidence here to justify this court in overturning the Railroad Commission order under attack" (R., p. 100), and that "on the broadest basis you can place the lawsuit, they have not overcome the *prima facie* validity of that order" (R., 101).

It was THIS MOTION and THIS GROUND that the trial court sustained. His judgment, omitting formal parts, recites:

> " * * * *the plaintiffs have failed to introduce sufficient evidence to justify the Court in granting the relief prayed for against the order of the Railroad Commission of Texas, complained of herein.*"
>
> "It is Therefore Ordered, adjudged and Decreed by the Court that the Plaintiffs Selby Oil & Gas Company and Lewis Production Company, take nothing by their suit, * * * " (Emphasis Supplied; quotation from Record, pps. 49-50).

This alone was specified as the error of the trial court by respondents (appellants there) in the Circuit Court of Appeals. (See Appellants' brief in Circuit Court of Appeals, p. 3).

REPLY TO RESPONDENTS' STATEMENT OF THE TESTIMONY AND TO RESPONDENTS' COUNTER-POINT II.

Respondents call to the attention of the Court (Brief, p. 3) that the Examiner who held the Commission hearing on the application for the permit, stated that "The testimony (before the Commission) was that on the spacing arrangement there is no immediate loss of oil on Applicant's lease." (Ex. 6; R., 59, 70). The same quotation is given by respondents under Counter-Point II at page 21 of their brief.

We are at a loss to understand why respondents would place emphasis upon an examiner's ideas about the evidence offered before the administrative body since respondents offer the Texas Supreme Court case of *Cook Drilling Company, et al* v. *Gulf Oil Corporation*, 139 Tex. ....., 161 S. W. 2d 1035, 1036, as a fair statement of Texas law. A portion of the opinion in this case quoted by respondents at page 15 of their brief provides:

> "The trial contemplated by the Act in question (Section 8, Article 6049c, Vernon's Texas Civil Statutes, 1925) is not for the purpose of deter-

> mining whether the Commission actually heard sufficient evidence to support its order, but whether there then existed sufficient facts to justify the entry thereof. * * * "

See also the quotation supplied by respondents from *Railroad Commission of Texas, et al* v. *Shell Oil Co., Inc.*, 139 Tex. ....., 161 S. W. 2d 1022, 1029-1030, at pages 16 through 18 of their brief; and in addition, see the Texas case of *Empire Gas and Fuel Company* v. *Railroad Commission of Texas* (Tex. Civ. App.) 94 S. W. 2d 1240, writ of error refused by the Texas Supreme Court, holding that an examiner's memorandum "is not binding on the Commission, nor does it constitute an official act of the commission until approved and made a part of the commission order."

Respondents' summary of the evidence (Brief pps. 3-6); indeed, respondents entire case is predicated upon the assumption that an order of the Texas Railroad Commission granted to prevent "confiscation" (drainage) may be set aside if upon a comparison of the tract in suit with *all surrounding tracts* the tract in suit has an advantage rather than a disadvantage. HERE LIES THE KEY TO RESPONDENTS FAILURE TO OFFER SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTIVE VALIDITY OF THE PERMIT ORDER.

Note carefully the following statement contained in Respondents' Brief, page 6:

> "If density of drilling on the 3.85-acre tract is compared with the density of drilling on a surrounding area of eight times the size of the 3.85-acre tract would be at a 37½% density disadvantage. (R., 92) *Such an area, however, did not take into account all of the* 149.8 *acres included in the surrounding leases.*" (R., 74-75.) (Emphasis supplied).

Indeed, such an eight times area comparison does not take into consideration all of the 149.8 acres included in the surrounding leases. Eight times the area of the tract outside of it is 30.80 acres*. Such a comparison is the method generally employed under Texas law in determining whether there be drainage advantage or disadvantage for small tracts, *Magnolia Petroleum Company* v. *Railroad Commission* (Texas Civ. App.) 127 S. W. 2d 223, writ of error denied by the Texas Supreme Court. The purpose of the rule is to afford a reasonable media of comparison within a reasonable drainage area as contemplated by the spacing rule.

A comparison of the tract with the 149.8 surrounding acres is a comparison of the tract with an area 38 times its size. Never within the knowledge of counsel for petitioners has the Texas Railroad Commission or the courts of this state cast aside the eight-times area comparison in determining drainage advantage or disadvantage for small tracts, although many have been the attempts by owners of large tracts in the East Texas field to induce the

*The tract was 3.85 acres (R., 107)

Texas Railroad Commission and the Texas courts to accept other methods. We are confident that this Court will be equally unresponsive to such efforts.

What did this Court mean in the *Rowan and Nichols cases* in saying it would not substitute its judgment and discretion in the matter of conserving Texas natural resources for the agency the people of Texas chose? What did the Texas Supreme Court mean when it said that the courts of Texas would not substitute their discretion for that committed to the agency by the Legislature, but would sustain the agency if it is reasonably supported by substantial evidence before the court? (See *Railroad Commission of Texas, et al.*, v. *Shell Oil Company, Inc., et al.* 161 S. W. 2d 1022, 1029).

The meaning of the highest Court of the United States and the highest Court of Texas is plain when a litigant attempts what these respondents attempted in the lower court. Respondents offered not one scintilla of evidence about "confiscation" (drainage) upon the basis long employed by the administrative agency and the courts of Texas. Can it now be so obscure—even to respondents—why the trial court held that "plaintiffs have failed to introduce sufficient evidence to justify the court in granting the relief prayed for against the order of the Texas Railroad Commission?" (R., p. 50)

REPLY TO RESPONDENTS' COUNTER-POINT I

(Respondents' Brief, pps. 8-19)

Respondents conclude their Counter-Point I by saying:

> "Obviously the trial court had jurisdiction of both claims involved in this suit, and respondents had a right to have the issue of fact determined by the trial court." (Brief, p. 19)

Here lies the fallacy in respondents eleven printed pages of argument. *The trial court did not dismiss for want of jurisdiction.* It denied respondents relief for failure to offer sufficient evidence to overcome the *prima facie* validity of the permit order of the Texas Railroad Commission (R., p. 49-50).

Nor do the *Rowan and Nichols cases* say that a federal district court does not have *jurisdiction* of cases involving a state's conservation laws. Those cases do hold that jurisdiction in such cases once invoked should be exercised by a trial court advisedly and that in such cases the court should ordinarily stay its hand and refrain from exercising the power it admittedly holds as a caution against substituting its notions of the proper administration of a state's conservation laws for that of the state. Had the trial court followed respondents' theory in the instant case it would have so substituted. In Texas the conservation agency and the courts hold that in determining drainage advan-

tage or disadvantage of a small tract an eight times area method of comparison is a reasonable one. Respondents sought cancellation of the permit order based upon a 38-times area comparison.

Petitioners have argued at length in their briefs in this cause and in the companion case of *G. E. Burford, et al.*, v. *Sun Oil Company, et al.*, No. 495, October Term, 1942, what they believe to be the proper scope of review by the federal courts in cases involving conservation of a state's natural resources. We shall not burden the court by a reiteration of that argument here.

REPLY TO RESPONDENTS' COUNTER-POINT III.

(Brief pps. 22-23)

Respondents' Counter-Point III likewise proceeds upon the erroneous assumption that the trial court held it had no *jurisdiction* to hear the case. Here again we point out that the trial court not only did not hold it had no jurisdiction and dismiss the cause; but that on the contrary the trial court assumed jurisdiction by hearing the cause and then proceeded to render judgment that respondents take nothing because they had not made out a case *on the evidence they offered.* (R., 49-50).

No evidence at all was offered that the tract in suit did not need the well permit to prevent "confiscation," drainage, upon the method of determination generally employed by the Texas Rail-

road Commission and the Texas Courts—an eight times area comparison. Indeed, upon cross-examination respondents' expert witness admitted that upon such a comparison the tract in suit was at a 37½% density disadvantage. (See respondents Brief, page 6).

The trial court having determined that the plaintiffs had failed to introduce sufficient evidence to prove their case; it would seem indisputable that in the trial court's opinion there was no evidence upon which to make findings. Whether or not there was evidence sufficient to make out a case was a question of law which the Circuit Court of Appeals should have passed upon if respondents are correct in their contention that federal courts will pass on questions of state law in cases involving conservation of a state's natural resources.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, *et al.*,
Petitioners,

v.

SELBY OIL AND GAS COMPANY, *et al.*,
Respondents.

ADDITIONAL ARGUMENT ON BEHALF OF PETITIONERS O. L. HASTINGS AND C. F. DODSON

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INDEX

Subject Matter

Authorities Cited

Cases Cited:

Statutes Cited:

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ADDITIONAL ARGUMENT ON BEHALF OF PETITIONERS O. L. HASTINGS AND C. F. DODSON

To Said Honorable Court:

In order to determine if this is a "case or controversy" within Clause 2, Section 1, Article III, of the Constitution of the United States, the nature of the case must first be determined.

The Order of the Railroad Commission Involved is Quasi-Judicial

It has been held many times that the action of the Railroad Commission in passing upon an application for a permit, whether in granting or rejecting same, is not purely administrative, but to the contrary is quasi-judicial. *Producers Refining Company v. M. K. & T. Railway Company, 13 S. W. (2d) 679 (Com. App.); Texas Steel Company v. Fort Worth & Denver City Railway Co., 40 S. W. (2d) 79 (Com. App.); Johnson Refinery v. State, 85 S*

W. (2d) 949; Gulf Land Company v. Atlantic Refining Company, 131 S. W. (2d) 73, 81 (Sup. Ct.); Brown v. Humble Oil & Ref. Co., 126 Tex. 296; Magnolia Pet. Co. v. Railroad Commission, 96 S. W. (2d) 273, 275 (Sup. Ct.).

Texas Statutes Do Not Confine Review of a Railroad Commission Order to a State Court in Travis County

It has already been shown that action of the Railroad Commission is not purely administrative, but is quasi-judicial. *Article 6049(c), Section 8, R. C. S. 1925,** gives to any interested person who may be disatsified with the quasi-judicial action of the Commission, the right to "file a suit" in a court of "competent jurisdiction in Travis County, Texas, and not elsewhere" to "test the validity" of such quasi-judicial order. The statute does not restrict a review to a court of competent jurisdiction *of* Travis County, Texas, but gives the right to go into any court of competent jurisdiction *in* Travis County, Texas.

MacMillan v. Railroad Commission, 51 Fed. (2d) 400, 403, squarely holds that a suit making attack on an order of the Railroad Commission was properly brought in the Federal Court, citing *Reagan v. Farmers Loan & Trust Company, 154 U. S. 362.* There are many reported decisions of Federal courts wherein orders of the Railroad Commission of Texas were under attack. This court cited the *MacMillan* case (upon another point) in the *Rowan & Nichols* Case, *310 U. S. 580.* The case of *Peoples Petroleum Prducers v. Smith, 1 Fed. Supp. 361*, was also a case in which an order of the Railroad Commission of Texas was involved in a Federal court suit, and that decision was cited

* Copied in Appendix.

by this court (upon another point) in the *Rowan & Nichols Case, 310 U. S. 580.*

If the Texas Legislature had intended to restrict reviews of the orders of the Railroad Commission to state courts in Travis County, it might have easily said so. It is beyond cavil that a Federal District Court *in* Travis County is a court of "competent jurisdiction", provided the requisite amount and diversity exists, or if constitutional questions are involved. Neither Section 10 nor Section 11 of *Article 6549(c), R. C. S. 1925,** detracts from this view. Section 10 is a restraint against issuance of injunction against the Commission, except after notice. It is significant that Section 10 provides that after the petition is filed "the clerk of the court in which such petition or application is filed shall issue notice to the Commission in writing". If it had been intended by this language that only the clerk of the state district court in Travis County could issue such notice, then appropriate words to that effect might have easily been used. There is nothing in the language of Section 10 calling for such action by the clerk of a specific court other than of the court where the suit is filed. Section 11 provides that in the case of an appeal, same shall at once be returnable "to the appellate court". The Legislature well knew that the state "appellate court" for Travis County was the Third Court of Civil Appeals at Austin. Had it intended that such appeal should go to said court, the Legislature would have said that the appeal should have been returnable at once to "the Court of Civil Appeals" for said county, or to the "Third Court of Civil Appeals", or used other specific, identifying language. It is

* Copied in Appendix.

only when such appeals are taken to the Court of Civil Appeals or to the Supreme Court that other provisions of Section 11 are applicable. The act specifies what shall be done in the event the appeal is to a state appellate court only, but does not attempt to expedite appeals except when through the state court.

Should an order of the Railroad Commission be invalid, it adversely and directly affects an adjoiner to the extent that such adjoiner must either move to invalidate such order by judicial decree, or risk his chances of being granted an opportunity to protect himself against such invalid order by similar treatment at the hands of the Commission, or must lose whatever property rights may be taken from him by such invalid order. It would therefore be improper to say that an "interested person" is only affected indirectly, particularly where he might show hurt or injury to valuable property rights should a given order of the Commission stand. The right "to test the validity" of an order of the Railroad Commission means the right to test the legality of such an order. The right to test legality, where a property right is involved, is a substantial right and one calling for judicial and not administrative determination.

A Suit to Test the Validity or Legality of a Railroad Commission Order is a "Case or Controversy" Within the Meaning of Article III of the Constitution of the United States

Determination of "validity" or "legality" of an order of the Railroad Commission is not simply ancillary or advisory but is a judicial determination rendering final the

disputable issues raised by the pleadings and evidence. A proceeding making an attack upon an order of the Railroad Commission has been held to be susceptible of judicial determination. This makes of such proceeding a "case" or "controversy" within the meaning of the Constitution. *La Abra Silver Mining Company v. United States, 175 U. S. 423, 457;* and *Matter of Facific R. Commission, 32 Fed. 241, 255.*

In such a suit there is presented the legal rights of adversary parties, even though the award of process or the payment of damages be not required, *Aetna Life Insurance Company v. Howarth, 300 U. S. 227;* and it is not necessary that the proceedings should be entirely de novo *(Old Colony Trust Company v. Commission, 279 U. S. 716).* However, Texas cases have held such an action to be de novo, *Gulf Land Company v. Atlantic Refining Company, 134 Tex. 59; Railroad Commission v. Shell Oil Company, 139 Tex. 66.* In order for a "case" or "controversy" to be presented it is not required that it be done by traditional forms or procedure, invoking only traditional remedies. *N. C. & St. L. Railway Company v. Wallace, 288 U. S. 249.* Are Federal courts precluded from taking cognizance of such cases if the suit involves adversary proceedings that are real, not hypothetical, that would be finanlly determined by judgment? Id.

Discussion of Railroad Commission v. Pullman Company

The rationale of this court's holdings in the *Pullman* case is that adjudication of constitutional questions should be avoided where a definitive ruling by a state court would settle the matter by a decision of the state statutory

powers under which the Commission acted. The Federal court stayed its hand until the state court could determine the meaning of *Article 6445, R. C. S. 1925*, rather than give a forecast and not a determination of state law.

The power of the Railroad Commission to promulgate Rule 37 is not an issue. That it had such power is settled. The standards by which an attack is to be made upon an order of the Commission pursuant to Rule 37 has been prescribed by the Supreme Court of Texas in *Brown v. Humble Oil & Refining Company, 126 Tex. 296; Magnolia Petroleum Company v. Railroad Commission, 96 S. W. (2d) 273 (Sup. Ct.); Railroad Commission v. Magnolia Petroluem Company, 109 S. W. (2d) 967; Magnolia Petroleum Company v. New Process Production Company, 104 S. W. (2d) 1106 (Sup. Ct.); Railroad Commission v. Shell Oil Company, 139 Tex. 66; and Cook Drilling Company v. Gulf Oil Corporation, 161 S. W. (2d) 1035 (Sup. Ct.)*

The validity and effect of state statute, Commission's rule thereunder and orders pursuant thereto having been judicially determined by state court of last resort, no reason obtains why the rule announced by this court in the *Pullman* case should apply.

Discussion of the Rowan & Nichols Case, 311 U. S. 614, 615

The rationale of this court's holding in the above cited case was that as it construed the decisions of the state court they "do not make clear whether the local courts may exercise an independent judgment * * *". We submit that the Supreme Court of Texas has specifically held that in a suit to test the validity or legality of an order of the Commission, the trial is de novo, evidence is to be heard anew, in-

dependently of what was before the Commission, based upon conditions as they existed at the time the Commission acted. From this "independent hearing" or "independent review", the courts will exercise an "independent judgment" as to the validity of the order. That the courts will not substitute their judgment and discretion for that of the Commission does not mean that its judgment as to the validity or legality of the order under review is not an "independent judgment".

*Article 6023, R. C. S. 1925,** confers power and authority upon the Commission to regulate drilling of and production from oil and gas wells, and for that purpose to make and enforce rules and regulations. Having promulgated Rule 37, it has heretofore been shown that in passing upon an application thereunder, the Commission acts in a quasi-judicial capacity, and not purely administrative. The Commission has also promulgated a rule requiring motions for rehearing to be filed and passed upon before its jurisdiction terminates. When it has acted upon such motions for rehearing, its jurisdiction is at an end. There is nothing in Sections 8, 10 and 11 of *Article 6049(c), R. C. S. 1925,* evincing a purpose on the part of the Legislature to confer upon the courts a continuation of the administrative process. It has ended when the Commission finally acts. That the courts do not perform an administrative function is clearly shown by the holdings of the Supreme Court of Texas that courts will not substitute their findings and judgment for that of the Commission, and that if the Commission's order is reasonably supported by substantial evidence that the Commission's action will be affirmed. A

* Copied in Appendix.

court review is then purely judicial for the purpose of testing the validity or legality of the order under attack.

The state court of last resort having passed upon the powers of the Commission and the extent to which a court might go, there is no basis for application of the principles announced in the *Rowan & Nichols cases* to this case.

This Case was Correctly Decided by the Trial Court

Believing that the Federal District Court had the power to hear and determine this controversy, we re-refer the court to Point II under Brief for Petitioners accompanying the Petition for Writ of Certiorari. In addition thereto, we desire to call the court's attention to *Article 6042, R. C. S. 1925**, which makes all orders of the Commission as to any matter within its jurisdiction, prima facie evidence of their validity. *Section 8 of Article 6049(c), R. C. S. 1925*, also provides that in trials of suits making attack upon any order of the Commission, such order shall be deemed prima facie valid. At the conclusion of plaintiff's testimony in the trial court, these petitioners moved for judgment (R. 100) upon the ground that plaintiffs "have not overcome the prima facie validity of that order" (R. 101.) The court granted that motion and specifically found that plaintiffs had "failed to introduce sufficient evidence to justify the court in granting the relief prayed for against the order * * * complained of herein" (R. 50). It was accordingly adjudged that plaintiffs "take nothing by their suit, that all relief prayed for by said plaintiffs be denied", and that the defendants recover their costs. (R. 50.) This was not a dismissal merely because the court could

* Copied in Appendix.

not "substitute its judgment for that of the Commission anymore" (R. 102), but was a judicial determination that upon the case as presented plaintiff had failed to show itself entitled to the relief prayed.

For a discussion of the presumptive validity of an order of the Commission, see *United Gas Public Service Company v. State, 89 S. W. (2d) 1094* (writ refused by the Supreme Court of Texas, and affirmed by this court in *303 U. S. 123, 625)*. The prima facie validity is sufficient to sustain the order unless the evidence clearly showed it to be unreasonable and unjust. *Humble Oil & Refining Company v. Railroad Commission, 112 S. W. (2d) 222.*

At this point we direct the court's attention to the fact that this case was tried in the court below in accordance with all the rules as announced by the highest courts of Texas, in that what was before the Commission was not paraded before the trial court. The evidence was restricted (almost wholly) to conditions as they existed when the Commission acted. The order of the Commission was all that was presented from the Commission's files.

The evidence showed without dispute that based upon the eight-times area surrounding applicant's lease [the basis for determining density advantage or disadvantage as adopted in *Shell Oil Company v. Railroad Commission, 133 S. W. (2d) 791, 792*], the tract involved was at a 37½% density or drainage disadvantage. (R. 91-92.)

The evidence further showed that respondents' lease would, under the West-East migration, drain approximately 75% of the oil from under the lease of these Petitioners. (R. 97.)

It is therefore, respectfully submitted that the judgment of the Fifth Circuit Court of Appeals should be reversed and that the judgment of the trial court shoud be affirmed.

Respectfully submitted,

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A copy of the foregoing Argument has been delivered to all opposing counsel.

W. EDWARD LEE,
Counsel for Petitioners, O. L. Hastings and C. F. Dodson.

APPENDIX

Art. 6023. Jurisdiction

Power and authority are hereby conferred upon the Railroad Commission of Texas, over all common carrier pipe lines conveying oil or gas in Texas, and over all oil and gas wells in Texas, and over all persons, associations or corporations owning or operating pipe lines in Texas, and over all persons, associations and corporations owning or engaged in drilling or operating oil or gas wells in Texas; and all such persons, associations and corporations and their pipe lines, oil and gas wells are subject to the jurisdiction conferred by law upon the Commission, and the Commission is authorized and empowered to make all necessary rules and regulations for the government and regulation of such persons, associations and corporations and their operations, and the Attorney General shall enforce the provisions of this title by injunction or other adequate remedy and as otherwise provided by law. The word "Commission," as used in this title, shall mean the Railroad Commission of Texas. The word "Commissioner" shall mean any member of the Railroad Commission.

Art. 6042. Powers not limited

Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, and until set aside or vacated by some order or decree of a court of competent jurisdiction, all orders of the Commission as to any matter within its jurisdiction shall be accepted as prima facie evidence of their validity.

Art. 6049c Oil and gas conservation, powers and duties of Railroad Commission

Suits authorized by persons aggrieved by Commissions' regulations or orders

Sec. 8. Any interested person affected by the consrvation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made of promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, s. 7; Acts 1935, 44th Leg., p. 180, ch. 76, s. 14.)

Notice of Commission as condition precedent to injunction; procedure

Sec. 10. No injunction, whether temporary restraining order, temporary injunction, permanent injunction, or other character of injunctive relief, shall be granted against the Railroad Commission, its members, agents, and representatives, to restrain it or them from enforcing any

rule, regulation, or order made and promulgated by the Railroad Commission under the conservation statutes of this State relating to oil and gas, or any amendments thereof, or restrain the enforcement of any such statute, except after notice to the Commission and a hearing as hereinafter provided; provided that when a petition or application is filed asking for any such character of temporary injunctive relief, the clerk of the court in which such petition or application is filed shall issue notice to the Commission in writing, which notice shall contain the docket number, style, and a brief statement of the nature of such suit, and such notice shall be served on the Commission by delivering a copy of such citation to the Commission or any member thereof, or to the Secretary thereof, in Travis County, for the service of other citations, and five (5) days from and after the service of such notice a hearing may be had on such application; provided further that the rule, regulation, or order complained of shall be taken as prima facie valid and the use and introduction of the verified petition of plaintiff shall not be sufficient to overcome the prima facie validity of the rule, regulation, or order complained of, or to empower the court to grant any injunctive relief against the enforcement of said rule, regulation, or order; provided further, that before any order granting any character of injunctive relief against any such statute or against any such rule, regulation, or order of the Commission shall become effective the plaintiff shall be required by the court to execute a bond with good and sufficient sureties in an amount to be fixed by the court reasonably sufficient to indemnify all persons when* the

* So in enrolled bill. Probably should read "whom."

court may find from the facts proven will suffer damages by reason of the violation of the statute, rule, regulation, or order complained of, such persons to be named in the order of the judge when the amount of the bond is fixed by the court and entered of record; provided further, that the finding of the court that any party is likely to suffer damage shall not be admissible as evidence of damages in any suit on such bond. In determining the amount of such bond it shall be the duty of the judge to take into consideration all of the facts and circumstances surrounding the parties and the ability of the plaintiff to make such bond in order to determine the amount and the reasonableness thereof under the facts and circumstances. And bond made or executed by any bonding or surety company shall be by some company authorized to do business in Texas. Such bond shall be made payable and approved by the judge of said court and shall be for the use and benefit of and may be sued upon by all persons named in said order who may suffer damages by reason of the violations of such statute, rule, regulation or order. Upon motion and for good cause shown, the court, after notice to the parties, may from time to time increase or decerase the amount of such bond, and may add new beneficiaries, and may require new or additional sureties as the facts may justify. Any person interested in the subject matter may, in the discretion of the court, intervene in any such suit. All suits on such bonds shall be instituted within six (6) months from the date of the final determination of the validity in whole or in part of such rule, regulation, or order. (As amended Acts 1935, 44th Leg., p. 74, ch. 28, s. 1.)

Appeals advanced in appellate court; jurisdiction of Courts of Civil Appeals to issue writs

Sec. 11. After notice and hearing is had upon application for any such injunctive relief either party to said suit has the right of appeal from any judgment or order therein granting or refusing any injunction, whether temporary restraining order, temporary injunction, permanent injunction, or other character of injunctive relief, or from any order granting or overruling a motion to dissolve any such injunction. Said appeal shall at once be returnable to the appellate court and said action so appealed shall have precedence in said appellate court over all cases, proceedings, and causes of a different character therein pending. The provisions and requirements of *Article 4662, Revised Civil Statutes of 1925*, relating to temporary injunctions shall likewise apply to appeals from any order granting or refusing a temporary restraining order, or granting or overruling a motion to dissolve such temporary restraining order, under the provisions of this Act. In the Court of Civil Appeals such court shall immediately and at as early a date as possible decide the questions involved therein; and in the event any question or questions shall be certified to the Supreme Court, or writ of error thereto be requested or granted, it is here made the duty of the Supreme Court immediately to set down said cause for hearing and decide the cause at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character in such court.

The Courts of Civil Appeals and the judges thereof are hereby vested with jurisdiction to issue writs of prohibi-

tion, mandamus, and injunction to prevent the enforcement of any order or judgment of any trial court or judge granting any character of injunctive relief without notice and hearing in violation of the requirements of Section 10, Chapter 26, Acts of the First Called Session of the Forty-second Legislature, as amended by this Act. Whenever it shall appear that such requirements of said Section with respect to notice and hearing have not been complied with, upon proper application presented by the Railroad Commission to the Court of Civil Appeals having jurisdiction, the said Court of Civil Appeals shall be empowered and it shall be its duty to issue instanter the necessary writs of prohibition, mandamus, or injunction to prohibit and restrain the trial judge from enforcing or attempting to enforce the provisions of the injunction issued by him, and to prohibit and restrain the party or parties in whose favor such order has been entered from acting or attempting to act under the protection of said order or from violating the statute or the rule, regulation, or order of the Commission attacked. (As amended Acts 1935, 44th Leg., p. 74, ch. 28, s. 2.)

No. 528

Supreme Court of the United States

October Term, 1942

O. L. HASTINGS, ET AL., *Petitioners*,

vs.

SELBY OIL AND GAS COMPANY, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

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INDEX

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VS.

SELBY OIL AND GAS COMPANY, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

Petitioners have not filed any brief in this case except their brief in support of the petition for writ of certiorari. This brief for Respondent is directed to that brief.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case is reported under the style of *Selby Oil & Gas Company*

et al vs. Railroad Commission et al, 128 Fed. (2d) 334, and is copied in the record at pages 106-112.

NATURE OF THE CASE

Petitioners' statement of the nature of the case is inadequate.

Respondents Selby Oil and Gas Company and Lewis Production Company were plaintiffs in the trial court and appellants in the Circuit Court of Appeals. Petitioners were defendants in the trial court, and appellees in the Circuit Court of Appeals.

The suit, brought in the United States District Court for the Western District of Texas, Austin Division, challenged validity of an order of the Railroad Commission of Texas granting Petitioners Hastings and Dodson a permit, as an exception to Rule 37[1], to drill a second well for oil and gas on a 3.85-acre tract of land in the proven area of the East Texas oil field. The bill of complaint asked for judgment cancelling the order and permit, and for injunction restraining drilling and operation of the well. (R., 4-11.)

The suit presented two claims for relief; first, that the result of the order of the Commission would be to deprive Respondents of their property without due process of law, and second, that the order was arbitrary and unreasonable and not supported by evidence. (R., 4-11.) The first claim asserted a right under the Fourteenth Amendment to the Constitution of the United States, and jurisdiction rested on the presence of a Federal question arising under the

[1]Pertinent parts copied, Appendix, *post*, page 24.

Fourteenth Amendment. As to the second claim, the suit was to enforce rights granted by Section 8, Article 6049(c), Vernon's Texas Annotated Civil Statutes, 1925,[1] and jurisdiction rested on diversity of citizenship.[2]

The trial court, on July 18, 1940, on the basis of the original opinion in *Railroad Commission vs. Rowan and Nichols Oil Company*, 310 U. S. 573 (decided June 3, 1940), at the conclusion of the Respondents' testimony, without making findings of fact or expressing judgment on the testimony, sustained Petitioners' motion for judgment, upon the theory that cases of this character are not cognizable in the Federal courts. (R., 102-103, 108-109.)

STATEMENT OF THE TESTIMONY

The order of the Commission granting the permit stated that it "should be granted to prevent confiscation of property[3]." (R. 107.) The report made to

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[1]Copied in Appendix, *post*, page 25.

[2]Reagan vs. Farmers Loan & Trust Company, 154 U. S. 362; McMillan vs. Railroad Commission of Texas, 51 Fed. (2d) 400; Gulf Land Company vs. Atlantic Refining Compeny, 113 Fed. (2d) 902; Stanolind Oil & Gas Company vs. Ambrose, 118 Fed. (2d) 847.

[3]Rule 37. Nos. 2 & 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas. Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

"The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such ex-

the Commission by the examiner who, on April 26, 1939, held the Commission hearing on the application for the permit, stated that, "The testimony was that on the spacing arrangement there is no immediate loss of oil on Applicant's (Hastings and Dodson's) lease." (Ex. 6; R., 59, 70.) The challenged order granted a permit to drill a second well on a 3.85-acre tract (Ex. 2; R., 59, 63, 64) in the proven area of the East Texas field. Respondents owned an oil and gas lease on a tract of land adjoining the 3.85-acre tract. (Ex. 1; R., 59, 62, 63.) The well on the 3.85-acre tract and each well on each adjoining tract was, at the time the Commission acted, under field-wide orders of the Comission, allowed to daily produce 20 barrels of oil. (R., 67, 98-99); the 3.85-acre tract was drilled to a greater density than the average of the surrounding tracts (R., 81-82); and to a greater density than the average of the East Texas field (R., 98). The 3.85-acre tract had, at the time of the hearing on the application, produced more oil per acre than the average of surrounding leases (R., 85); the number of barrels of oil allowed to be produced per acre per day from the 3.85-acre

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ception and that same should be granted to prevent confiscation of property;

"Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2, to be spaced as follows:

No. 2—150 feet east of the west lines;
130 feet southwest of well No. 1.

"It is Further Ordered that well No. 3 is hereby denied."

tract exceeded the average per acre per day production allowed to the surrounding leases (R., 86). The existing well on the 3.85-acre tract was sufficient to produce the tract's fair share of the recoverable oil, and on a basis of 20 barrels per day allowable would recover an amount of oil substantially equivalent to the amount of recoverable oil originally in place, and in place under the lease at the time of the hearing on the application and at the time the order was made granting the permit. (R., 87.) The drilling and production of a second well on the 3.85-acre tract would result in that tract having a production and drainage advantage over each and every adjoining tract. (R., 88.) At the time the hearing was held on the application, and at the time the permit was granted, the 3.85-acre tract was not suffering drainage of oil to other leases that would ultimately result in its owners being prevented from recovering an amount of oil substantially equivalent to the amount of recoverable oil in place under the lease. (R., 88.) The drilling of a second well on the 3.85-acre lease and the production of oil from that well would result in more oil being recovered from that tract than the amount of recoverable oil in place under the tract (R., 88), and in the drainage of large quantities of oil (estimated at approximately 80,000 barrels) from Respondents' lease (R., 77, 94-95). Respondents, like Petitioners Hastings and Dodson, without a second well on the 3.85-acre tract, had sufficient wells to produce the recoverable oil under their tract. (R., 87.) The drilling of an offset well on Respondents' tract to the well involved in this suit would not prevent, but only reduce, the drainage caused by a

second well on the 3.85-acre tract (R., 92), and would cost Respondents some ten or twelve thousand dollars (R., 93.) If density of drilling on the 3.85-acre tract is compared with the density of drilling on a surrounding area of eight times the size of the 3.85-acre tract it appears that the 3.85-acre tract would be at a 37½% density disadvantage. (R., 92.) Such an area, however, did not take into account all of the 149.8 acres included in the surrounding leases. (R., 74-75.)

The testimony was from Mr. R. D. Parker (R., 72-99), whose qualifications as an expert were admitted. (R., 71.)

SUMMARY OF THE ARGUMENT

Counter-Point I.

The holding of the Circuit Court of Appeals that Respondents were entitled to a hearing in the trial court on the issue of confiscation in violation of the Fourteenth Amendment, and on the issue of the validity of the Commission order as unreasonable and unsupported by substantial evidence, was not in conflict with the opinions of this court.

Authorities

Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, 391-392.

Railroad Commission of Louisiana vs. Cumberland Tel. & Tel. Co., 212 U. S. 414, 420.

Railroad Commission of Texas vs. Rowan & Nichols Oil Co., 310 U. S. 573; 311 U. S. 614.

Railroad Commission of Texas vs. Rowan & Nichols Oil Co., 311 U. S. 570.

Siler vs. Louisville & Nashville Ry. Co., 213 U. S. 175, 191.

Green vs. Louisville Ry. Co., 244 U. S. 499, 508.

Railroad Commission vs. Pullman Co., 312 U. S. 496.

City of Chicago vs. Fieldcrest Dairies Corp., 316 U. S. 168.

McMillan et al vs. Railroad Commission, et al, 51 Fed. (2d) 400.

Gulf Land Co., et al vs. Atlantic Refining Co., et al, 113 Fed. (2d) 902.

Stanolind Oil & Gas Co. vs. Ambrose, 118 Fed. (2d) 847.

Cook Drilling Co. et al vs. Gulf Oil Corp., 139 Tex. ——, 161 S. W. (2d) 1035, 1036.

Railroad Commission of Texas et al vs. Shell Oil Co., Inc., et al, 139 Tex. ——, 161 S. W. (2d) 1022, 1029.

Gulf Land Co. vs. Atlantic Refining Co., 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.

Article 3, Sec. 2, Clause 1, Constitution of the United States.

Section 41(1)(b), Title 28, United States Code Annotated.

Section 8 of Article 6049c, Vernon's Texas Civil Statutes 1925.

Railroad Commission Rule 37.

Counter-Point II.

The testimony did not show as a matter of law that the order of the Commission was valid.

Authorities

Gulf Land Co. vs. Atlantic Refining Co., 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.

Railroad Commission et al vs. Shell Oil Co., Inc., et al, 139 Tex. —— 161 S. W. (2d) 1022, 1029.

Counter-Point III.

Where the trial court decided the suit upon the erroneous belief that it was not a suit within the jurisdiction of the court, it was proper for the Circuit Court of Appeals to remand for the trial court to make findings on the facts.

Authorities

Rule 52, *Rules of Civil Procedure for the District Courts of the United States.*

ARGUMENT

1.

The holding of the Circuit Court of Appeals that Respondents were entitled to a hearing in the trial court on the issue of confiscation in violation of the Fourteenth Amendment, and on the issue of the validity of the Commission order as unreasonable and unsupported by substantial evidence, was not in conflict with the opinions of this court.

Jurisdiction of the Federal courts to determine the merits of the claim asserted under the Fourteenth Amedment is not open to question. Jurisdiction of these courts to determine the merits of the claim that the order is unreasonable, arbitrary and

unsupported by evidence, differing, if it does differ, from the claim that the results of the order will be to take Respondents' property without due process, is equally certain. Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, grants to any person whose property rights are affected by an order of the Railroad Commission the right to attack the order as unreasonable, arbitrary or without evidentiary support, although it may not be in violation of the Constitution. *(Gulf Land Co. et al vs. Atlantic Refining Co. et al*, 134 Tex. 59, 131 S. W. (2d) 73; *Railroad Commission et al vs. Shell Oil Co., Inc., et al*, 139 Tex. ——, 161 S. W. (2d) 1022, 1029-1030; *Cook Drilling Co. et al vs. Gulf Oil Corporation*, 139 Tex. ——, 161 S. W. (2d) 1035, 1036.) Section 8 of Article 6049c is not a procedural statute, but one that affects the substantive rights of the parties. Where the right granted by the statute is asserted in a Federal Court (certainly in cases where jurisdiction rests on diversity of citizenship), the Federal Court should apply the law of the state in determining the merits of the claim. *(Erie R. Co. vs. Tompkins*, 304 U. S. 64, 78-80.)

Article III, Section 2, Clause 1, of the Constitution of the United States, grants to the federal courts jurisdiction of controversies between citizens of different states, and Section 41 (1) (b), Title 28, United States Code Annotated, places jurisdiction of such controversies in the District Courts of the United States. In *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391-392, of a similar statute allowing appeals from orders of the Railroad Commission, the court said:

> * * * "For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another State having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts." * * *
>
> "We need not, however, rest on the general power of a Federal court in this respect, for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit."

In *Railroad Commission of Louisiana vs. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 420, of a constitutional provision giving a right of appeal to the courts for review of Commission orders, the court said:

> * * * "The single question before us is as to the character of the rates provided in Order No. 532, whether such rates are confiscatory, or, if there is any difference, whether the rates are only unreasonable, unjust and inadequate, although not confiscatory, and, therefore, not in violation of the Federal Constitution. The question un-

> der Atricles 284 and 285 of the Constitution of Louisiana, *supra*, even of the unreasonableness of the rates, may be inquired into by a Federal court, by reason of the diverse citizenship of the parties to this suit, and the complainant is not confined to a state court upon this question."

The principle announced in these cases has been followed by Federal courts in taking jurisdiction of suits against the Railroad Commission of Texas. (*McMillan et al vs. Railroad Commission*, 51 Fed. (2d) 400; *Gulf Land Co. vs. Atlantic Refining Co.*, 113 Fed. (2d) 902; *Stanolind Oil & Gas Co. vs. Ambrose*, 118 Fed. (2d) 847.

Neither the original opinion in the first *Rowan & Nichols* case (*Railroad Commission et al vs. Rowan & Nichols Oil Co. et al.*, 310 U. S. 573) nor any of the other opinions relied upon by Petitioners (on rehearing, *Railroad Commission et al vs. Rowan & Nichols Oil Co.*, 311 U. S. 614; *Railroad Commission et al vs. Rowan & Nichols Oil Co.*, 311 U. S. 570; *Railroad Commission et al vs. Pullman Co.*, 312 U. S. 496; *City of Chicago et al vs. Fieldcrest Dairies, Inc.*, 316 U. S. 168) support Petitioners' contention that the Circuit Court of Appeals erred in holding that the United States District Court for the Western District of Texas had jurisdiction of Respondent's suit and that Respondent was entitled to have the judgment of that court on the issues of fact involved in the case.

In the original opinion in the first *Rowan & Nichols* case (310 U. S. 580), the court said:

> * * * "Except where jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power."

On petition for rehearing the above quoted statement was challenged, and with citation to *Siler vs. Louisville & Nashville Ry. Co.*, 213 U. S. 175, 191, and *Green vs. Louisville Ry. Co.*, 244 U. S. 499. 508, it was contended that jurisdiction having attached, it extends to the case as destinguished from the question upon which jurisdiction of the court rests. Jurisdiction in the *Rowan & Nichols* cases was grounded on a federal question. In the opinion on motion for rehearing (311 U. S. 614), the court withdrew the above quoted sentence from the original opinion and stated that "the presence of a federal question may also open up state issues."

The question of local law involved in the first *Rowan & Nichols* case was a claim founded on the state statute requiring that proration be on a "reasonable basis." The court stated that the available Texas decisions did not make clear "whether the local courts may exercise an independent judgment on what is 'reasonable,'" and concluded that from such Texas decisions as were available it appeared that "the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the Respondent in effect asserted to exist in his claim under the Due Process Clause." Having ruled that the claims of Rowan & Nichols Oil Company under

the Due Process Clause were untenable, the court disposed of the question arising under local law by stating: "What ought not to be done by the federal courts when the Due Process Clause is invoked ought not be attempted by these courts under the guise of enforcing a state statute."

The meaning of the original opinion (310 U. S. 580) and the opinion on motion for rehearing (311 U. S. 614) in the first *Rowan & Nichols* case is perfectly clear. In so far as the question now under discussion is concerned they mean that where jurisdiction rests on a federal question, questions arising under local law may also be decided when necessary to a correct disposition of the case; but where a claim made under the Due Process Clause has been found untenable, a claim made under local law that involves the same range of inquiry will be denied.

Deletion of the above quoted sentence from the original opinion and the disposition made by the court of the question arising under local law did not mean, as Petitioners seem to think, that the court denied jurisdiction of the Federal Courts over "all litigation where a state statutory remedy is involved."

In the second *Rowan & Nichols* case (311 U. S. 577), the court did state: "In denying the petition for rehearing in the earlier case we held that whatever rights the state statute may afford are to be pursued in the state courts." The statement should be read in the light of the opinion on rehearing in the first case, stating that the Texas courts had not determined the scope of judicial inquiry contem-

plated by the state statute which was made the basis of the local question of law involved.

Points of difference between this case and the *Rowan & Nichols* cases which distinguished this case from those cases are: (1) Jurisdiction in this case is founded both on the presence of a federal question and on diversity of citizenship. Jurisdiction in the *Rowan & Nichols* cases was founded alone on the presence of a federal question. (2) Entry of the Railroad Commission order under attack in this case involved the exercise of *quasi* judicial power. The Railroad Commission regulations involved in the *Rowan & Nichols* cases were legislative in character. (3) As will hereafter be shown, the Supreme Court of Texas has determined the scope of judicial inquiry contemplated by the Texas statute under which local questions arise in this case. This court determined in the *Rowan & Nichols* case (311 U. S. 615) that the Texas courts had not definitely determined the scope of judicial review contemplated by the statute under which the local question arose in that case.

The point decided in *Railroad Commission, et al vs. Pullman Company*, 312 U. S. 496, and in *City of Chicago, et al vs. Fieldcrest Dairies, Inc.*, 316 U. S. 168, upon which Petitioners rely here, is that where a suit involves questions arising under the Constitution of the United States, but decision of such questions may be avoided by a construction of a local statute by the courts of the state, and such statute has not been construed by the court of last resort of the state, the Federal Courts will withhold determination of the question of constitutional law, pending the parties litigating the question of local law in the state courts. This court will not make "a tenta-

tive answer which may be displaced tomorrow by a state adjudication." (312 U. S. 500; 316 U. S. 172.)

The rule adopted in the *Pullman* and *Fieldcrest Dairies* cases is not applicable here, because the only questions of local law involved in this case are the scope of judicial inquiry permissible under Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, and the meaning of "confiscation" as used in Rule 37; and those questions have been determined by the Supreme Court of Texas in the following cases.

In *Cook Drilling Co., et al vs. Gulf Oil Corp.*, 139 Tex. ———, 161 S. W. (2d) 1035, 1036, the Supreme Court of Texas determined the scope of judicial review contemplated by Section 8 of Article 6049c, in suits challenging orders of the Railroad Commission granting permits to drill wells in exception to the general spacing provisions of Rule 37. There the court said:

> "The trial contemplated by the Act in question (Section 8, Article 6049c, Vernon's Texas Civil Statutes, 1925) is not for the purpose of determining whether the Commission actually heard sufficient evidence to support its order, but whether there then existed sufficient facts to justify the entry thereof. Since there is to be a full hearing of the facts in the district court, whether the Commission actually heard sufficient evidence to sustain the order is not material. * * * The rights of the parties will be fully protected if, upon a contest of the order in the district court, the parties are given full opportunity to show that at the time the order was entered there did, or

did not, then exist suficient facts to justify the entry of the same."

In *Railroad Commission of Texas, et al vs. Shell Oil Co., Inc.*, 139 Tex.————————, 161 S. W. (2d) 1022, 1029-1930, the Supreme Court of Texas again stated the scope of review contemplated by Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, in suits such as this, saying:

> * * * "It will be noted that the above statute (Section 8 of Article 6049c, Vernon's Texas Civil Statutes, 1925, heretofore quoted) refers to the action as a 'suit.' It further provides that 'In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order.' A trial generally includes a judicial examination of the issues between the parties, whether of law or of fact. 42 Words and Phrases, p. 481. Moreover, there would have been no necessity for the placing of the burden of proof if proof was not to be heard. The Act in question clearly contemplates that the evidence shall be taken anew in the district court.
>
> * * ***"Nevertheless, when the validity of an order of such an agency is contested in court, certain presumptions are indulged in favor of the validity of such order in some instances. If the matter covered by the order is one committed to the agency by the Legislature, and involves the exercise of its sound judgment and discretion in the administration of the matter so committed to it, the court will not undertake to put itself in the position of the agency, and de-

termine the wisdom or advisability of the particular ruling or order in question, but will sustain the action of the agency so long as its conclusions are reasonably supported by substantial evidence. * * * Hence it is generally recognized that where the order of the agency under attack involves the exercise of the sound judgment and discretion of the agency in a matter committed to it by the Legislature, the court will sustain the order if the action of the agency in reaching such conclusion is reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, nor does it mean that the court is bound to select the testimony of one side with absolute blindness to that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that conmitted to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."

* * * "The fact, however, that in some instances the action of the agency is to be sustained, if it is reasonably supported by substantial evidence, does not militate against the hearing of the evidence anew in

> the trial court. In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same."

In *Gulf Land Co. et al vs. Atlantic Refining Co., et al.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80, the court construed the term "confiscation," as used in Rule 37, as follows:

> * * * As used in Rule 37 and the rule of May 29th, the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under one of the exceptions in Rule 37, well permits may be granted to prevent "confiscation.' It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the rule of May 29th. Empire Gas & Fuel Co. vs. Railroad Commission, Tex. Civ. App.,

94 S. W. (2d) 1240, writ refused. The right to be protected against confiscation under commission oil and gas rules is not absolutely unconditional or unlimited."

Obviously the trial court had jurisdiction of both claims involved in this suit, and Respondents had a right to have the issue of fact determined by the trial court.

Counter-Point II.

The testimony did not show as a matter of law that the order of the Commission was valid.

The trial court did not purport to make findings of fact in this case or to decide the case upon the legal effect of the testimony. (R., 102-103.) The Circuit Court of Appeals made a statement (R., 108) of the nature of the testimony introduced upon the trial of the case. This statement might be regarded as the findings of fact of that court, but for the action of the court in stating that Respondents and the Circuit Court of Appeals were deprived of the judgment of trial court on the facts, and the remand of the cause for the trial court's findings and judgment on the facts.

It was permissible for the trial court to hear the facts anew. *(Railroad Commission et al vs. Shell Oil Co., Inc., et al*, 139 Tex. ——, 161 S. W. (2d) 1022, 1029.)

It appears from the foregoing statement of the undisputed testimony that at the time of the Railroad Commission hearing, the 3.85-acre tract of Pe-

titioners Hastings and Dodson's was not being drained by wells on adjoining leases (R., 88); that the tract with one well enjoyed a drilling density advantage over the average of the surrounding leases and over the average of the entire East Texas field (R., 82, 98); that the tract enjoyed a production advantage over the average of the surrounding leases (R., 85, 86); that the existing well on the tract would produce the tract's fair share of the recoverable oil, and an amount of oil substantially equivalent to the recoverable oil under the tract (R., 87); that the drilling and operation of the proposed second well would give the 3.85-acre tract production and drainage advantage over each and every surrounding lease (R., 88), and result in its owners recovering more oil than the amount of recoverable oil under the tract (R., 88); that the drilling and operation of the proposed second well would result in draining large quantities of oil from Respondent's adjoining lease (R., 77, 94-95); that Petitioners Hastings and Dodson's existing well and Respondents' existing wells were sufficient to produce the oil of their respective leases (R., 87); that the drilling by Respondents of an offset well to the proposed well would not prevent the draining of Respondents' lease by the proposed well, but only reduce the extent of drainage (R., 92), and such an offset well would cost Respondents between ten and twelve thousand dollars (R., 93).

For some unaccountable reason the Commission based its order on the ground that the permit "should be granted to prevent confiscation of property." (R., 107.) This statement was made in the

order notwithstanding the fact that the Railroad Commission Examiner who held the hearing on the application reported to the Commission that "the testimony was that on the spacing arrangement there is no immediate loss of oil on applicant's (Hastings and Dodson's) lease." (Ex. 6; R., 59, 70, 71.)

The Supreme Court of Texas, in *Gulf Land Co., et al vs. Atlantic Refining Co., et al*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80, defined the term "confiscation," as used in Rule 37, as follows:

> * * * "As used in Rule 37 and the Rule of May 29th, the term 'confiscation' evidently has reference to deprivinig the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under one of the exceptions in Rule 37, well permits may be granted to prevent 'confiscation.' It is the law that every owner or lessee of land is entitled to a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37 and the Rule of May 29th."

Reasonable minds cannot differ as to the inference to be drawn from the undisputed testimony stated above. It definitely appears therefrom that Petitioners Hastings and Dodson were not suffering "confiscation" of their oil and gas; that their lease was not suffering drainage to wells on adjoining leases. The testimony was equally convincing that

the drilling of the proposed well and the production of oil from it would take Respondents' property, while they stood bound by the Commission orders and without means or ways to prevent the taking of their property.

Certainly the testimony was sufficient to show that the order of the Commission was not supported by any evidence, that the order granting the permit was arbitrary and unreasonable, and that its effect would be to deprive Respondents of their property without due process.

Counter-Point III.

Where the trial court decided the suit upon the erroneous belief that it was not a suit within the jurisdiction of the court, it was proper for the Circuit Court of Appeals to remand for the trial court to make findings on the facts.

Rule 52, **Rules of Civil Procedure for the District Courts of the United States,** provides that "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereof." The purpose of the Rule is to give the appellate courts the benefit of the judgment of the trial court on the facts. When it appears from the record that the trial court erroneously determined that the suit was not one within the jurisdiction of the court, and for that reason the case was reversed on appeal, it was proper to remand for the purpose stated.

WHEREFORE, it is respectfully submitted that

the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Copies of this Brief have been furnished to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistnts Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.

Attorney for Respondents.

APPENDIX

Rule 37 contains the following pertinent provisions:

> "No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property * * * ."

Article 6049c, Section 8, Vernon's Texas Civil Statutes, 1925, provides:

> "Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

No. 528

Supreme Court of the United States

October Term, 1942

O. L. HASTINGS, ET AL., *Petitioners*

VS.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents

ANSWER TO PETITIONERS' REPLY BRIEF

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No. 528

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O. L. HASTINGS, ET AL., *Petitioners*,

VS.

SELBY OIL AND GAS COMPANY, ET AL.,
Respondents

ANSWER TO PETITIONERS' REPLY BRIEF

Respondents make the following answer to the "Reply Brief for Petitioners":

I.

In their reply brief Petitioners question the interpretation which Respondents place upon the statements made by the trial Court in sustaining Petitioners' motion for judgment. Respondents interpret the trial Court's action as a ruling that the case

was not one of which the Federal Courts would take cognizance. The first, third and fourth sections of the reply brief are understood to present the view that the trial Court determined the merits of the case as developed by the testimony. The answers are:

(1) The statements (R., 102-103), made by the trial Court in sustaining the motion for judgment, signify that the trial Court ruled that the original opinion of this Court in the first Rowan & Nichols case required that the trail not adjudicate fact issues involved in such cases as this. This construction is supported by (a) the trial Court's statement, in effect, that the Rowan & Nichols opinion directed him not to substitute his judgment for that of the Railroad Commission; (b) the failure of the trial Court to make findings of fact, as required by Rule 52, Rules of Civil Procedure of District Courts of the United States.

(2) The Circuit Court of Appeals (R., 106-108, 111) gave to the trial Court's statements the same interpretation and meaning that Respondents have given to them.

(3) Petitioners at one time appeared to have somewhat the same views as Respondents have with respect to the basis of the trial Court's denial of relief. (See Petition for Writ of Certiorari, pp. 14-15.)

II.

The second subdivision of Petitioners' reply brief discuses two subjects (1) Respondents' referring to

the report by the Railroad Commission examiner who held the hearing on Petitioners' application, that "The testimony was that on the spacing arrangement there is no immediate loss of oil on applicant's lease"; and (2) their contention that the question of drainage is to be determined by comparing density of drilling on the 3.85-acre tract with density of drilling on a surrounding area eight times its size. The answers to these contentions are:

(1) Respondents recognize that the ultimate question is not what evidence was before the Commission at the time the permit was granted, but whether there then existed sufficient facts to justify the granting of the permit. However, in addition to stating the testimony offered to show that there did not exist at the time the permit was granted sufficient facts to justify the Commission's action. Petitioners made reference to the report of the Examiner to show the absence of any testimony before the Commission which would justify the granting of a permit for the purpose of preventing "confiscation."

(2) Frequently density comparisons have been made by comparing the density of drilling on a tract in issue with a surrounding area eight times its size; but the results of such comparisons are not always controlling on questions of drainage. *(Magnolia Peroleum Co. vs. Railroad Commission*, 120 S. W. (2d) 553, 554; *Shell Oil Co., Inc., vs. Railroad Commission*, 133 S. W. (2d) 791, 792.) Certainly, such comparisons do not control as against undisputed testimony in this case that the extisting well

on the tract in question will produce the recoverable oil under the tract and that the tract is not suffering any drainage that will prevent its owners' recovering through the one well the reserves of the tract and its fair share of the oil. (R., 87-88.) An area surrounding the 3.85-acre tract and of eight times its size would include eleven existing wells, or 30.8 acres with an average of one well to each 2.8 acres. (S. F., 91-92.) Two wells on the 3.85-acre tract would result in it having a density of one well to each 1.92-acres, or 68 per cent advantage over the surrounding area, and drainage of adjacent lands.

WHEREFORE, Respondents pray that the judgment of the Circuit Courts of Appeals be affirmed.

Respectfully submitted,

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Attorneys for Respondents.

Copies of this Brief have been furnished to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistants Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.

Attorney for Respondents.

No. 528

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O. L. HASTINGS, ET AL., *Petitioners*,

vs.

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Respondents

ARGUMENT FOR RESPONDENTS ON RE-ARGUMENT OF THE CAUSE

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INDEX

AUTHORITIES

No. 528

Supreme Court of the United States

OCTOBER TERM, 1942

O. L. HASTINGS, ET AL., *Petitioners*,

VS.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents

ARGUMENT FOR RESPONDENTS ON RE-ARGUMENT OF THE CAUSE

The discussion will consider only the questions on which the Court has requested argument. A statement of the nature of the case and the pertinent facts will facilitate the discussion.

Respondents brought this suit against Petitioners in the United States District Court for the Western District of Texas, Austin Division, challenging the validity of an order of the Railroad Commission, and asking that such order be cancelled and the drilling

and operation of any well under it be enjoined. (R., 4-11). The claims for relief were: **first,** that the result of the challenged order will be to deprive Respondents of their property without due process of law, and **second,** that the order was arbitrary and unreasonable and not supported by evidence. (R., 4-11). Jurisdiction of the trial court rested on two bases: **first,** that the suit involved rights claimed under the Constitution of the United States, in that Respondents contended that the effect of the challenged order will be to deprive them of their property without due process of law; and **second,** that because of the diversity of citizenship between Petitioners and Respondents, the trial court had jurisdiction of Respondents' suit, vouched to them by Section 8 of Article 6049c, Vernon's Civil Statutes of Texas, 1925,[1] attacking the order as arbitrary and unreasonable and not supported by evidence.

The Commission assigned as the reason for granting the permit that it "should be granted to prevent confiscation of property"[2]. (R., 107). The examiner who held the hearing on the application for permit had reported to the Commission that "the testimony

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[1] Copied in Appendix, *post*, 27.

[2] "Rule 37. Nos. 2 and 3, Jim Dickson, 3.85 acres Mary Cogswell Survey, Rusk County, Texas. Applicant: Hastings & Dodson, c/o John A. Storey, Vernon, Texas.

"The application of Hastings & Dodson for an exception under the provisions of Rule 37 coming on to be heard on the 26th day of April, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property;

"Now, Therefore, it is Ordered that the application of Hastings & Dodson for an exception under the provisions

was that on the spacing arrangement there is no immediate loss of oil to applicants' (Hastings and Dodson) lease." (Exhibit 6, R., 59, 70.)

The challenged order granted a permit to drill a second well on a 3.85-acre tract (Ex. 2; R. 59, 63, 64) in the proven area of the East Texas field. Respondents owned an oil and gas lease on a tract of land adjoining the 3.85-acre tract. (Ex. 1; R., 59, 62, 63.) The well on the 3.85-acre tract and each well on each adjoining tract was, at the time the Commission acted, under field-wide orders of the Commission, allowed to daily produce 20 barrels of oil. (R., 67, 98-99); the 3.85-acre tract was drilled to greater density than the average of the surrounding tracts (R., 81-82); and to a greater density than the average of the East Texas field (R., 98). The 3.85-acre tract had, at the time of the hearing on the application, produced more oil per acre than the average of surrounding leases (R. 85); the number of barrels of oil allowed to be produced per acre per day from the 3.85-acre tract exceeded the average per acre per day production allowed to the surrounding leases (R., 86.) The existing well on the 3.85-acre tract was sufficient to produce the tract's fair share of the recoverable oil, and on a basis of 20 barrels per day allowable would recover an amount of oil substantially equivalent to the amount of recover-

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of Rule 37 and a permit to drill well No. 2, Jim Dickson lease containing 3.85 acres of land out of the Mary Cogswell Survey in Rusk County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill well No. 2, to be spaced as follows:

No. 2—150 feet east of the west lines;
130 feet southwest of well No. 1.

"It is Further Ordered that well No. 3 is hereby denied."

able oil originally in place under the lease, and in place under the lease at the time of the hearing on the application and at the time the order was made granting the permit. (R., 87.) The drilling and production of a second well on the 3.85-acre tract would result in that tract having a production and drainage advantage over each and every adjoining tract. (R., 88.) At the time the hearing was held on the application, and at the time the permit was granted, the 3.85-acre tract was not suffering drainage of oil to other leases that would ultimately result in its owners being prevented from recovering an amount of oil substantially equivalent to the amount of recoverable oil in place under the lease. (R., 88.) The drilling of a second well on the 3.85-acre lease and the production of oil from that well would result in more oil being recovered from that tract than the amount of recoverable oil in place under the tract (R., 88), and in the drainage of large quantities of oil (estimated at approximately 80,000 barrels) from Respondents' lease (R., 77, 94-95.) Respondents, like Petitioners Hastings and Dodson, without a second well on the 3.58-acre tract, had sufficient wells to produce the recoverable oil under their tract. (R., 87.) The drilling of an offset well on Respondents' tract to the well involved in this suit would not prevent, but only reduce, the drainage caused by a second well on the 3.85-acre tract (R., 92), and would cost Respondents some ten or twelve thousand dollars (R., 93.) If density of drilling on the 3.85-acre tract is compared with the density of drilling on a surrounding area of eight times the size of the 3.85-acre tract it appears that the 3.85-acre tract would be at a 37½% density disadvantage. (R., 92.) Such

an area, however, did not take into account all of the 149.8 acres included in the surrounding leases. (R., 74-75.)

At the conclusion of Respondents' testimony Petitioners moved for judgment. (R., 101.) The motion was sustained (R., 102, 103), and judgment was entered in behalf of Petitioners (R., 49-50.) The ruling was based on a belief that the decision of this Court in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 310 U. S. 573, denied the trial court jurisdiction of such a case as was made by the pleadings and evidence in this case.

This case being an appeal from an order sustaining a motion for judgment on Respondents' testimony, the testimony must on this appeal be accepted as true. *(Moreman et al vs. Armour & Co. et al*, 65 S. W. (2d) 334; *Bugh et al vs. Employers' Reinsurance Corp.* (Fifth Cir.), 63 Fed. (2d) 36. Further "only that portion of the evidence which tends to prove the case of the demuree can be considered and evidence which tends to break down the case of demuree can not be considered." (64 C. J. 380.) When the testimony is so considered two results are evident: (1) that the evidence is sufficient to support a conclusion that the effect of the order will be to take Respondents' property without due process of law, and (2) that the evidence is sufficient to support the conclusion that the order was arbitrary and unreasonable and not supported by evidence. There was evidence that the result of the order will be to enable Petitioners Hastings and Dodson to drain Respondents' land, and there was no evidence that without the proposed well Petitioners Hastings and Dodson will not be able to recover their oil. The trial court did not make any determination of the

facts. *(Selby Oil & Gas Co. et al vs. Railroad Commission of Texas et al*, 128 Fed. (2d) 334.)

The jurisdictional question upon which the court has requested additional argument is confined to "does the jurisdiction of federal district courts over **controversies between citizens of different states*** include jurisdiction to review the orders, involved in this case, of the Texas Railroad Commission?" It is, therefore, assumed that the Court is satisfied that under the pleadings and evidence the trial court had jurisdiction of this suit in so far as jurisdiction is grounded on a claimed right under the Fourteenth Amendment to the Constitution of the United States, and the discussion will be limited to the question, "does the jurisdiction of federal courts over **controversies between citizens of different states** include jurisdiction to review the orders, involved in this case, of the Railroad Commission?"

The court proceedings provided by Texas law for judicial examination of the orders of the Railroad Commission are "cases" or "controversies" within the meaning of Article III, Section 2, Clause 1, of the Constitution of the United States.

Rule 37 provides that:

> "No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than

*Emphasis throughout the argument is supplied.

> above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property" * * *.

In *Gulf Land Co. vs. Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80, the court said:

> * * * "the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind."

The order involved in this case granted a permit to drill a well in exception to Rule 37. The Commission grounded its order on the basis that the drilling of the well was necessary "to prevent confiscation of property." The Railroad Commission is bound by its rule and can grant a permit to prevent the confiscation of property only if the well is, in fact, necessary to prevent such confiscation. *(Railroad Commission vs. Gulf Production Co.*, 134 Tex. 122, 125-126, 132 S. W. (2d) 254, 255; *Gulf Land Co. vs. Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.)

The Texas statute (Section 8 of Article 6049c) provides that:

> "Any interested person affected by * * * any rule, regulation or order made or promulgated by the Commission * * *, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis Coun-

> ty, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said * * * rules, regulations or orders. * * * In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

In *Railroad Commission vs. Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030, a suit brought under the above statute, the court said:

> * * * "In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same."

The quoted language clearly means that Section 8, Article 6049c, gives to a person dissatisfied with such an order of the Railroad Commission as is involved in this case, a right or cause of action to litigate the validity of the order and have the court determine whether or not there existed at the time the order was entered suffcient facts to justify the order. If it appears upon the trial of a suit brought under the statute that there did not exist sufficient facts to justify the order, the legal result is that the order was arbitrarily made and entered. The statute contemples an adversary action. As in this case,

the Respondents contend that the proposed well is not necessary "to prevent confiscation of property," and that the drilling of the well and production of oil from it will result in taking Respondents' property; while the Petitioners contend that the order of the Commission is justified to prevent confiscation of their property; so, in any case brought under the statute challenging a permit to drill a well in exception to Rule 37, there will be an adverse interest between the parties in respect to property rights.

The court proceeding contemplated by the statute is entirely judicial in its nature. It contemplates a hearing of testimony, the findings of facts, the entry of a judgment, and the issuance of process to enforce the judgment. It is not a proceeding in which the court will or may determine the wisdom of the Commission action, but one in which the court will determine only the power and authority of the Commission under the facts to take the action in question. The proceeding in the court is not legislative in character like that involved in *Prentis vs. Atlantic Coast Line Company*, 211 U. S. 210.

The controversy present in such a case is definite and concrete, touching the legal relations of the parties having adverse legal interests. (*Aetna Life Insurance Co. vs. Haworth*, 300 U. S. 227, 240-241). A concrete case is presented involving real and substantial controversy and admitting of immediate and definite determination of the legal rights of the parties. The judicial function includes the issuance of process to enforce obedience to the judgment entered.

In this case when the application for the order was

before the Commission, the Commission had for determination the question of whether or not the proposed well was necessary to prevent confiscation of the Petitioners' property. On the trial before the court, the court had for determination the questions (1) whether or not evidence which existed at the time the order was entered was sufficient to justify the granting of the permit; that is, whether or not the facts existing at the time the order was entered were sufficient to show that without the proposed well Petitioners' property would be confiscated,—this under Section 8 of Article 6049c; and (2) whether or not the drilling and operation of the proposed well would result in depriving Respondents of their property without due process of law,—this under the Due Process Clause and also under Section 8 of Article 6049c. The Commission in the first instance did not have for determination a question of legislative nature or governmental policy, but it was called upon to exercise a *quasi* judicial power; and the trial court was called upon to exercise only judicial power. The order of the Commission was to be made on the basis of past and existing facts, and not for prospective application, as in the case of a rate order.

This case does not involve the determination of state governmental policies committed by statute to the state administrative process; but, on the contrary, involves property rights of the parties.

Included in the Railroad Commission regulatory powers is the power to promulgate well spacing rules for the purpose of preventing waste of oil and gas. Rule 37 provides for exceptions to the general spac-

ing rule where such exceptions are necessary to prevent confiscation of property or to prevent waste. If provisions were not made for exceptions to prevent waste, then the cardinal purpose of the rule would be defeated in cases where exceptions are necessary to prevent waste. If provisions were not made for exceptions to prevent confiscation of property, then the rule might under some circumstances and in some applications be invalid. Unless the rule lays down a standard to guide the Commission in granting exceptions, the rule is invalid. It does purport to provide such a standard, namely, the prevention of confiscation of property and the prevention of waste.

In *Railroad Commission, et al vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1026, the court said:

> * * * "There must be some factual basis for classifying some applicants as subject to the general spacing provisions of the rule and other applicants as within the exception. This reasonable basis can only be a showing of unusual conditions peculiar to the area where the well is sought to be drilled—not testimony that would be equally applicable to any other part of the field. Therefore, in order to sustain the validity of the rule we must give it the construction that the exception is to be granted only upon a showing of unusual conditions.
>
> * * * "If it is intended to grant permits to some and refuse them to others under like circumstances, the rule gives the Commission the power of arbitrary discrimination, and is void."

This case does not involve the determination of a state governmental policy committed to the Railroad Commission of Texas. It was in the exercise of the governmental policy that the state committed to the Railroad Commission the power to promulgate rules for the prevention of waste of oil and gas. In the exericise of this power the Commission promulgated Rule 37 and provided for exceptions to the general spacing rule. The matter of granting a permit under the provision for exceptions *to prevent confiscation of property*, as in this case, is not a matter of governmental policy, but one of determining the property rights of the applicant in relation to the correlative rights of owners of adjacent lands. If the applicant is suffering confiscation of his property, he has a legal right to a permit to drill a well in exception to Rule 37. If his property is not being confiscated and the proposed well will result in draining oil from adjoining leases, he does not have any right to a permit to drill; and the Commission is without power to grant him such a permit. Where the permit has been granted in the absence of existing facts justifying the Commission action, suit by an adjacent land owner who will be adversely affected by the drilling and production of the well does not involve a matter of governmental policy, but property rights of the parties.

Article 6049c, Vernon's Texas Civil Statutes, does not confine the review thereby contemplated to a state court in Travis County.

In 1891, the Legislature of Texas enacted a statute establishing the Railroad Commission of Texas.

(Acts of the Regular Session of the Twenty-second Legislature, page 55; 10 Gammel's Laws of Texas, 57). Section 6[1] of this statute provided that any railroad company or other party at interest who was dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, might file suit "in a court of competent jurisdiction in Travis County, Texas," attacking the same. The substance of this section of the statute appears as Article 6453, Vernon's Texas Civil Statutes.

In *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S. 362, 391, the court said:

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts. *Cowles v. Mercer County*, 7 Wall. 118; *Lincoln County v. Luning*, 133 U. S. 529: *Chicot County v. Sherwood*, 148 U. S. 529.
>
> "We need not, however, rest on the gen-

[1]Copied in Appendix, *post*, p. 28.

> eral powers of a Federal court in this respect, for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 6 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language differing from that which ordinarily would be used to describe a court of the State was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis County.' Not only is Travis County within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held Act of June 3, 1884, c 64, 23 Stat. 35. It comes, therefore, within the very terms of the act."

This holding of the Supreme Court of the United States in the *Reagan* case has stood without question from May 26, 1894.

Section 8 of Article 6049c was originally enacted in 1932. It is presumed that the Legislature had knowledge of the construction which had previously been given to the Act of 1891 by the Supreme Court of the United States in the *Reagan* case with respect

to the right of a dissatisfied party to file his suit in the United States District Court for the Western District of Texas. The Legislature in using in Section 8 of Article 6049c substantially the same language as that used in the Act of 1891 is presumed to have intended that the language in the later Act be given the same construction as that given the language in the earlier Act. As a matter of statutory construction, it will be presumed that the Legislature in enacting Section 8 of Article 6049c intended that it be given the same construction as was given the former Act. (*Arrowood vs. Blount*, 121 Tex. 52, 41 S. W. (2d) 412, 414; *Stephens County vs. Hefner*, 118 Tex. 397, 16 S. W. (2d) 804.)

It has heretofore been considered settled that a dissatisfied person might bring suit in the United States District Court for the Western District of Texas on the cause of action vouched to him by Section 8 of Article 6049c, where diversity of citizenship existed between the parties. See *McMillan vs. Railroad Commission*, 51 Fed. (2d) 400; *Gulf Land Co. vs. Atlantic Refining Co.*, 113 Fed. (2d) 902; and *Stanolind Oil & Gas Co. vs. Ambrose*, 118 Fed. (2d) 847.

Furthermore, Article 6049c cannot be construed to confine the review thereby contemplated to a state court in Travis County, and the Article upheld as valid. Obviously it gives to the dissatisfied party a right to attack the validity of Railroad Commission orders on something short of constitutional grounds. See *Railroad Commission vs. H. & T. C. R. R. Co.*, 90 Tex. 340, 38 S. W. 750, 755, 756, involving the Act of 1891, previously referred to.

If the laws of the State of Texas recognize such a right or cause of action in the dissatisfied or injured party and accord to the citizens of this State the right to litigate in the state courts, the property right being personal to the litigants and not public in character, the Legislature of Texas could not, where the amount in controversy is within the jurisdiction of a Federal District Court, deny to a person the right to bring his suit in a Federal District Court where diversity of citizenship exists between the parties.

In *Railroad Commission of Louisiana vs. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 420, a provision of the Constitution of Louisiana provided that a person dissatisfied with a Commission order might file a petition in a court of competent jurisdiction "at the domicile of the Commission, against the Commission as Defendant," and that either party thereto might appeal to the Supreme Court of the State. In the case cited, the Court said:

> * * * "The single question before us is as to the character of the rates provided in Order No. 552, whether such rates, are confiscation, or, if there is any difference, whether the rates are only unreasonable, unjust and inadequate, although not confiscatory, and, therefore, not in violation of the Federal Constitution. The question under Articles 284 and 285 of the Constitution of Louisiana, *supra*, even of the unreasonableness of the rates, may be inquired into by a Federal court, by reason of the diverse citizenship of the parties to this

> suit, and the complainant is not confined to a state court upon this question."

In the *Reagan* case, *supra*, at page 391, the Court said:

> * * * "For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another State having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts."

Any other rule would transgress the provisions of Article III, Section 2, Clause 1, of the Constitution of the United States, providing that the judicial power of the Federal Government shall extend to controversies between citizens of different States. And a State Legislature may not validly deny to a citizen of another State, where diversity of citizenship exists between the parties, the right to litigate his property rights in the Federal courts, assuming that the jurisdictional amount is present.

Undoubtedly Section 8 of Article 6049c gives to an interested party or one disadvantageously affected by an order of the Railroad Commission the right

to bring suit challenging such order. The effect of the statute is to give to such a person a cause of action or right to bring a suit attacking the validity of the order and, where successful, to secure equitable relief against enforcement of the order or action under it.

While the Texas Legislature cannot by its enactments enlarge or limit the jurisdiction of Federal courts by providing that certain classes of suits may or may not be brought in a Federal court, it can create causes of action in behalf of persons and corporations of which Federal courts may assume jurisdiction where the necessary jurisdictional amount is present and the parties are residents and citizens of different states.

Whether or not the right or cause of action given by Section 8 of Article 6049c may be prosecuted only in a state court is a question which can be decided finally only by this court. If the Texas courts were to hold that suits on the right or cause of action given by Section 8 of Article 6049c can be brought in the state courts, but only in those courts, this court would undoubtedly hold that where diversity of citizenship exists and the necessary jurisdictional amount is present, the suits can be brought in the Federal courts, nothwithstanding the ruling of the Texas courts. Such a construction of the statute by the courts of Texas would uphold the legislative declaration of the public policy of the state that the right and cause of action given by the statute exist in persons disadvantageously affected by Commission orders and may be litigated in the Texas courts. If this court were to strike the statute down because the Texas courts in construing it had limited

its terms to contemplate suits between private individuals only in the state courts, then such a ruling by this court would defeat the public policy of the state as declared by the Legislature, with the result that the statute would be destroyed and this court would, in effect, say that since under the statute, so construed, suits contemplated by it cannot be brought in the Federal courts, they may not be brought in any court. And, so, as in the first instance, the Texas courts would attempt to control the jurisdiction of the Federal courts, so in the second instance the Federal courts would deny to citizens of Texas the right to litigate in the state courts rights and causes of action given by the Texas law; and thereby this court would attempt to control the jurisdiction of the state courts. In order to preserve the public policy of the state, as declared by the statute, and uphold the statute, this court would, of necessity, have to hold that, notwithstanding the construction placed upon the statute by the Texas courts, suits on the right or cause of action given by the statute may be maintained in the Federal courts where there is diversity of citizenship between the parties and the requisite jurisdictional amount is present. (*Frost vs. Corporation Commission*; 278 U. S. 515, 526-528; *Truax vs. Corrigan*, 257 U. S. 312, 341-342.) Any other holding by this court would defeat the public policy of the state in granting the right or cause of action. The general rule that construction of a state statute by the court of last resort of the state is binding on this court would not prevent such a holding by this court.

The fact that the statute provides that the Commission shall be made a party to such a suit would

present no obstacle to such a holding by this court if the statute were so constructed by the Texas courts, because in such a suit the charge must be that the members of the Commission acted illegally or in excess of their legal authority and in such a circumstance official character of the members of the Commission would be disregarded and in the litigation they would be looked upon as having acted as individuals. (*Ex parte Young*, 209 U. S. 123.)

The Texas courts could not construe the statute to confine jurisdiction of such suits to the state courts and uphold the statute as giving the right to bring such suits only in the state courts and thereby defeat jurisdiction of the Federal courts; and if the Texas courts so construed the statute, this court to avoid denying to the Texas Legislature the right to give its citizens a cause of action to be litigated in the state courts and to uphold constitutional jurisdiction of the Federal courts, would have to hold that under the statute, where diversity of citizenship exists and the jurisdictional amount is present, that suits contemplated by the statute may be brought in a Federal court.

The holding in *Alpha Petroleum Company vs. Terrell et al*, 122 Tex. 257, 59 S. W. (2d) 364, 367-369, does not weigh against the contentions here made, because in that case the court was only considering the question of whether or not, under Section 8 of Article 6049c, suit might be brought in the district court of Montgomery County, Texas or only in a district court of Travis County, Texas. The court was only considering which of the several state district courts of Texas had jurisdiction of a suit instituted to assert the right or cause of action granted by the statute.

The Texas Workmen's Compensation Act, Article 8307, Section 5, Vernon's Texas Civil Statutes, in its pertinent parts, provides:

> ***"Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board (Industrial Accident Board) shall, with in twenty (20) days after the rendition of said final ruling and decision by said board, file with said Board notice that he will not abide by said final ruling and decision, and he shall, within twenty (20) days after giving such notice, bring suit in the county where the injury occurred to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided."

The Texas courts have held that the requirement of this statute that suit shall be brought "in the county where the injury occurred" is jurisdictional in character. *(Oilmen's Reciprocal Ass'n. vs. Franklin*, 116 Tex. 59, 286 S. W. 195; *Mingus vs. Wadley*, 115 Tex. 551, 285 S. W. 1084.) It has been held that the statute does not exclude the jurisdiction of the Federal district court of the district including the county where the injury occurred, provided there is diversity of citizenship between the parties and the jurisdictional amount is shown. *(Ellis vs. Assn. Industries Ins. Corp.*, 24 Fed. (2d) 809, 810, writ of certiorari denied, 278 U. S. 649.)

In *Ry. Co. vs. Whitton's Adm.*, 13 Wall. 270, there was involved a Wisconsin statute providing for the

recovery of damages whenever the death of a person was caused by a negligent act or default of another. The statute further provided "that such action shall be brought for a death caused in this state, and **in some court established by the constitution and laws of the same.**" In that case the Court held that the provision requiring the action to be brought in a court of the state did not prevent removal to a federal court and maintenance in that court of a suit brought under the statute.

The question is analogous to that which is raised by statutes which required that upon a foreign corporation obtaining a permit to do business in a state, the corporation must agree not to remove to a Federal court any suit brought against it. *(Harrison vs. St. Louis & S. F. R. R. Co.*, 232 U. S. 318, 328; *Holmes Ins. Co. vs. Morse*, 20 Wall. 445, 453.) The state may not by general law grant a right to persons and forbid its enforcement in the Federal courts where there is diversity of citizenship and the jurisdictional amount is shown.

There are not present in this case grounds similar to those found in Railroad Commission vs. Pullman Co., 312 U. S. 496, which make it appropriate for the District Court to withhold the exercise of its equity jurisdiction.

The *Pullman Company* case involved the construction of a local statute which had not been construed by the courts of last resort of the State. It also involved a claimed right under the Constitution of the United States. Depending upon the construction of a State statute by the courts of last resort of the State, the issues in the case might be disposed of

without determining the question arising under the Constitution of the United States. To avoid making "a tentative answer which may be displaced tomorrow by a State adjudication," this Court remanded the *Pullman Company* case with directions to the trial court to retain the case on the docket, pending the parties securing a construction of the statute by the State courts. A similar situation existed in the case of *City of Chicago, et al., vs. Fieldcrest Dairies, Inc.*, 316 U. S. 168. No such situation exists in this case. The Supreme Court of Texas in *Railroad Commission of Texas vs. Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1035, has determined the scope of judicial review contemplated by Section 8 of Article 6049c.

The only other possible question of statutory construction that could be involved in this case is whether or not Article 6049c confines the review thereby contemplated to a State court. Obviously the Supreme Court of Texas cannot construe that statute, as it is involved in this case, where there is a diversity of citizenship, to limit the review to a State court. If the Supreme Court of Texas did construe the statute as having such a purpose, this court nevertheless would say, and necessarily so under Article III of the Constitution of the United States, that so long as the State statute gives to citizens of the State the cause of action provided by Article 6049c, it cannot deny to a citizen, where there is diversity of citizenship between the parties and the required jurisdictional amount is present, the right to litigate his claims in a Federal court.

There are not present in this case grounds similar to those upon which the Court in Railroad Commission vs. Rowan & Nichols Oil Company, 311 U. S. 614, 615, held it was proper for the Federal District Court to decline jurisdiction of the cause.

In the *Rowan & Nichols* case the question arising under the local law was whether or not the challenged plan of proration distributed "the allowable production among the various producers on a reasonable basis." This Court concluded that the Texas decisions did not make clear whether the local courts would exercise an independent judgment on what is "reasonable," and that under the Texas cases, as understood by this Court, the standard of "reasonable basis" under the statute opened the same range of inquiry as the oil company, in effect, asserted to exist in its claims under the Due Process Clause. The Court had found these claims to be untenable and held that, "what ought not to be done by the Federal courts when the Due Process Clause is invoked, ought not to be attempted by these Courts under the guise of enforcing a State statute." In this appeal the ultimate question involved is whether or not Respondent was entitled to a hearing and determination of the facts by the trial Court. So far as the state statute is concerned, the question to be determined here is whether or not there existed sufficient evidence to support the challenged order. The range of inquiry under this statute is not the same as the range of inquiry opened up by the claim under the Fourteenth Amendment. There the range of inquiry is confiscation *vel non*.

The Supreme Court of Texas has heretofore held in *Gulf Land Co. vs. Atlantic Refining Co.*, 134. Tex.

59, 70-71, 131 S. W. (2d) 73, 80, that the term "confiscation," as used in Rule 37, means "depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind." In *Railroad Commission of Texas et al vs. Shell Oil Company, Inc., et al*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030, the Supreme Court of Texas has held that in a suit under Article 6049c, the trial is for the purpose of determining whether or not at the time the order was entered there then existed sufficient facts to justify the same. So far as the question arising in this case under local law is concerned, the issue and scope of inquiry have been definitely settled by the Supreme Court of Texas. The issue is whether or not there existed at the time the challenged order was entered sufficient facts to support the conclusion that the challenged order was necessary to prevent Petitioners Hastings and Dodson being denied a fair chance to recover the oil and gas in and under their land, or their equivalent in kind.

The only recent decision of the Supreme Court of Texas which could possibly be urged as raising a question as to whether or not "grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615," exist in this case "which make it appropriate for the District Court to decline jurisdiction of the cause," is *Railroad Commission of Texas vs. Wencker*, decided February 10, 1943, 168 S. W. (2d) 625, advance sheet of March 23, 1943. In the companion cases, No. 495, *G. E. Burford et al, Petitioners, vs. Sun Oil Co. et al.*, and No. 496, *Sun Oil Co. et al, Petitioners,*

vs. G. E. Burford et al, Respondents, a memorandum was filed after oral argument, citing the *Wencker* case and urging that the decision in the *Wencker* case demonstrates that the Texas law on the scope of judicial review of Rule 37 orders is so uncertain that the Federal courts should not assume the burden of passing on the validity of such orders. The controlling question in the *Wencker* case was whether or not the Commission had passed on Wencker's application as a request for a second well. The Court concluded that the Commission had not passed on the application as a request for a second well and that, since the Commission's jurisdiction was primary, the case was moot. The case does not bear upon the question of scope of review.

WHEREFORE, it is respectfully submitted that the judgment and order of the Circuit Court of Appeals should be affirmed.

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Austin, Texas,
Attorneys for Respondents.

Copies of this Argument have been furnished to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistants Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.

APPENDIX

Section 8, Article 6049c, Vernon's Texas Civil Statutes, 1925, provides as follows:

> "Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, sec. 8; Acts 1935, 44th Leg., p. 180, ch. 76, sec. 14.)" Vernon's Ann. Civ. St., Art. 6049c, Sec. 8.

Section 6, Chapter 51, pp. 58, 59, Acts of the Twenty-second Legislature, Regular Session (10 Gammel's Laws of Texas, pp. 60, 61), provides as follows:

> "Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act, or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: Provided, that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice."

No. 528

Supreme Court of the United States

OCTOBER TERM, 1942

O. L. HASTINGS, ET AL., *Petitioners*,

vs.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents

RESPONDENTS' REPLY: (1) to "ADDITIONAL ARGUMENT ON BEHALF OF PETITIONERS O. L. HASTINGS AND C. F. DODSON," submitted on re-argument of the cause; and (2) to "DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR RE-ARGUMENT," filed on behalf of the Railroad Commission and G. E. Burford, et al.

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INDEX

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Respondents were served on April eighth with copies of two arguments which it is assumed will be filed in this cause. One is an additional argument on behalf of Petitioners O. L. Hastings and C. F.

Dodson, signed by Messrs. John Porter and W. Edw. Lee, attorneys for Petitioners Hastings and Dodson. The other is endorsed with the style and number of this case and also with the style and number of the other cases restored to the docket for re-argument: No. 495, *G. E. Burford, et al., Petitioners, vs. Sun Oil Company, et al., Respondents*, and No. 496, *Sun Oil Company, et al., Petitioners, vs. G. E. Burford, et al., Respondents.* The latter mentioned argument is signed by the Attorney General of Texas and Messrs. Simmons and Smullen, Assistants Attorney General of Texas, attorneys for the Railroad Commission, and Messrs. F. L. Kuykendall and James P. Hart, attorneys for G. E. Burford, et al.

It is Respondents' purpose to here reply to both of these arguments.

REPLY TO ARGUMENT ON BEHALF OF O. L. HASTINGS AND C. F. DODSON

Respondents interpret the copy of argument which has been served on Respondents' attorneys by the attorneys for Petitioners Hastings and Dodson as agreeing with Respondents' contentions:

> 1) That this is a case or controversy within the meaning of Article III of the Constitution of the United States;
>
> 2) That the order of the Railroad Commission involved in this suit was promulgated in the exercise of quasi-judicial power; that the suit invokes the jurisdiction of the Court to determine property rights of Respondents and Petitioners Hastings and Dodson, and does not involve

the determination of State governmental policy committed by statute to the State administrative process;

3) That Article 6049c, Vernon's Texas Civil Statutes, in providing that review of the Commission's orders shall be in "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," does not confine that review to a State Court in Travis County, Texas;

4) That there are not present in this case grounds similar to those which existed in *Railroad Commission vs. Pullman Company*, 312 U. S. 496, which would have made it appropriate for the District Court in its discretion to have withheld the exercise of its equity jurisdiction in this case; and,

5) That there are not present in this case grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615, which would have made it inappropriate for the District Court to have declined jurisdiction of this cause.

The copies of the argument of Petitioners Hastings and Dodson as served upon Respondents' counsel seem clearly to take the same position on each of the above mentioned questions as is taken by Respondents in their printed argument submitted on re-argument of the cause.

The last subdivision of the argument of Petitioners Hastings and Dodson is devoted to the contention that the case was correctly decided by the Trial

Court. This part of the argument is grounded upon the proposition that the Trial Court actually decided the case on its merits. The Court has not requested additional argument on this subject, and Respondents would not avert to it here except for the fact that it has been raised by Petitioners Hastings and Dodson.

In the original briefs and in oral argument on original submission of the cause, the nature of the Trial Court's ruling and the basis of it were discussed at length. In reply to what Petitioners Hastings and Dodson now have to say on this subject, Respondents refer the Court to pages 101-103 of the Record. It there appears that counsel for Petitioners Hastings and Dodson took the position that the evidence was not sufficient to overcome the *prima facie* validity of the order. (R., 101.) The Trial Court took the position that this Court, in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 310 U. S. 573, (the only decision in either of the *Rowan & Nichols* cases that had been handed down at the time the Trial Court acted), had ruled that the Trial Court should not substitute its judgment for that of the Commission and that because of that decision he could not "substitute my judgment and discetion for theirs and restrain them by injunction." (R., 102-103.) The statements of the Trial Court in announcing his decision reveal the ruling or holding upon which the judgment (R., 49-50) was predicated. The Trial Court did not make or file any findings of fact or conclusions of law required by Rule 52 of the *Rules of Civil Procedure*. The Circuit Court of Appeals in this case *(Selby Oil & Gas Co.*,

et al. vs. Railroad Commission of Texas, et al., 128 Fed. (2d) 334) placed upon the action of the Trial Court and the record thereof the interpretation which Respondents here place upon it.

Even if it be conceded for the purpose of argument that the Trial Court's action was not based upon an interpretation of the *Rowan & Nichols* case, *supra*, respecting the jurisdiction of the Court, but upon the sufficiency of the evidence to show Respondents entitled to the relief sought, the judgment of the Trial Court would nevertheless be erroneous. The Trial Court sustained the motion made by Petitioners Hastings and Dodson for judgment. (R., 102-103.) Petitioners Hastings and Dodson, in effect, had demurred to the evidence. (R., 101-102.) On appellate review of a judgment based on such a motion, the Court will consider the evidence in the light most favorable to the party resisting the motion. The law is stated in 64 *Corpus Juris* 380, as follows:

> * * * "Only that portion of the evidence which tends to prove the case of the demurree can be considered and evidence which tends to break down the case of demurree cannot be considered. In all jurisdictions it is held that the court cannot weigh conflicting evidence on a demurrer thereto, but must take as true every part of it favorable to the party resisting the demurrer which tends to prove his case, and, in most jurisdictions, must treat as withdrawn the evidence favorable to demurrant."

At pages 2 to 5 of the "ARGUMENT FOR RESPONDENTS ON RE-ARGUMENT OF THE CAUSE," there is set out a summary of the testimony introduced on the trial of this cause. It does not overstate the case to say that the evidence was sufficient to show, as a matter of law, that there did not exist at the time the order of the Commission was entered sufficient facts to justify the order; that is, that there did not exist at the time the challenged order was entered sufficient facts to show that the drilling of the proposed well was necessary "to prevent confiscation of property," the basis assigned by the Commission for the order granting the permit to drill. *(Railroad Commission, et al., vs. Shell Oil Co., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030.) However, if the Court should think that such a statement is more than the testimony merits, it cannot be disputed that the testimony was sufficient to raise a fact issue as to whether or not there existed at the time the order was entered sufficient facts to justify the order; and, in the presence of such a fact issue, Petitioners were not entitled to judgment on the motion. It then became the duty of the Trial Court to state findings of facts and conclusions of law, and upon these base a judgment. The Trial Court stated that under the *Rowan & Nichols* case this Court had told the Trial Court "not to substitute its judgment for that of the Commission any more." (R., 102-103.) Such was the basis of the Trial Court's judgment as revealed by what the Trial Court said.

REPLY TO DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR REARGUMENT, FILED BY THE RAILROAD COMMISSION AND G. E. BURFORD, ET AL.

In this portion of the argument, replying to the argument filed on behalf of the Railroad Commission of Texas and G. E. Burford, et al., the term "Petitioners" refers to the Railroad Commission of Texas and G. E. Burford.

Petitioners contend:

1) That this suit is not a case or controversy within the meaning of Article III of the Constitution of the United States;

2) That Article 6049c confines jurisdiction of suits brought under it to a State District Court in Travis County, Texas; and,

3) That in view of recent decisions of the Texas Courts, there are in this case grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615, which made it appropriate for the District Court to decline jurisdiction of the cause.

Respondents apparently concede:

1) That this suit does not involve determination of State governmental policy committed by statute to State administrative process; and,

2) That there do not exist in this case grounds similar to those existing in *Railroad Commission vs. Pullman Co.*, 312 U. S. 496, which would have made it appropriate for the District Court in its discretion to withhold the exercise of its equity jurisdiction.

The points of difference, therefore, between Petitioners and Respondents seem to be the first three stated above.

Petitioners ground their contention that this suit is not a case or controversy within the meaning of Article III of the Constitution of the United States upon the bases: (1) that Section 8 of Article 6049c, in providing that, "any interested person affected" by an order of the Railroad Commission, and "who may be dissatisfied therewith" may bring suit challenging the validity of such order, does not contemplate that the person bringing the suit shall show as a basis of his right to sue that he has been or will be injured by the order; (2) that in a suit under Section 8 of Article 6049c to cancel an order of the Railroad Commission granting a well drilling permit, the person to whom the permit has been granted is not a necessary party to the suit; and (3) that Section 8 of Article 6049c provides procedural rights and does not affect substantive rights of the parties.

The meaning of the words "cases" and "controversies," as used in Article III, Section 2, Clause 1, of the Constitution of the United States, has been defined by descisions of this Court, and there is no occasion for a discussion of the meaning of these

words as there employed. A question for discussion is whether or not the instant suit comes within the meaning of those words, as their meaning has been interpreted by the decisions of this Court. The bases of Petitioners' contention that this suit does not come within the meaning of those terms will be restated and discussed seriatim:

> **(1) "That Section 8 of Article 6049c, in providing that, 'any interested person affected' by an order of the Railroad Commission, and 'who may be dissatisfied therewith' may bring suit challenging the validity of such order, does not contemplate that the person bringing the suit shall show as a basis of his right to sue that he has been or will be injured by the order."**

In support of their contention that a showing of injury is not necessary to the right to sue under Section 8 of Article 6049c as an "interested person affected" by the challenged order, Petitioners rely upon *Spear vs. Humble Oil & Refining Company*, 139 S. W. (2d) 212, and *Railroad Commission vs. Shell Oil Company*, 165 S. W. (2d) 503. It is respectfully submitted that Petitioners misinterpret these opinions.

The very use in the statute of the word "affected" must be understood to refer to parties whose rights are acted upon or influenced by the challenged order, for "affected" means, "to lay hold on, to act upon, produce an effect upon, * * * to touch." *(Webster's International Dictionary.)* Petitioners in their argument do not give significance to this word or consider that the term "interested person" is used in the statute.

In *Spear vs. Humble Oil & Refining Company*, 139 S. W. (2d) 212, 216, the Court said:

> "In this connection, the majority do not sustain the remaining contention of appellant raising the question that it was necessary for appellee to allege that it would not be able during the producing life of the field and the wells on its tract to recover through such wells the amount of oil equivalent to the amount of oil beneath such tracts; nor to show injury to its private property rights sufficient to call for the intervention of the court of equity. It is the majority view that this question has been raised in numerous cases and that it has been overruled by this court; and that the Supreme Court has dismissed and refused writs of error in such cases; and deem the matter as being foreclosed by such decisions. The writer's view on the matter is set forth in the above discussion of the correlative rights of the parties."

The cases referred to by the Court in the above quoted part of the opinion, as we understand, are some of those hereinafter cited; and others hereinafter cited have been decided since the *Spear* case was decided.

In *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 165 S. W. (2d) 503, 504, the Court said:

> * * * "The Shell lease abutted the 6.07 a. tract on the west, and Shell was a party to the proceeding before the Commission.

> Under repeated decisions it was an interested party, within our conservation statutes (Vernon's Ann. Civ. St. art. 6049c) and the rules of the Commission, and was entitled to maintain the suit. Empire Gas & Fuel Co. v. Railroad Comm., Tex. Civ. App., 94 S. W. 2d 1240, error refused; Railroad Comm. v. Gulf Production Co., Tex. Civ. App., 115 S. W. 2d 505, affirmed 134 Tex. 122, 132 S. W. 2d 254; Stanolind Oil & Gas Co. v. Midas Oil Co., Tex. Civ. App., 123 S. W. 2d 911 error dismissed."

The quoted statement should be read in the light of what was said in the cases cited by the Court. Following are the pertinent parts of the opinions in the cited cases.

In *Empire Gas & Fuel Company vs. Railroad Commission of Texas, et al.*, 94 S. W. (2d) 1240, 1244 (error refused), the Court said:

> "The statute (Article 6049c, Vernon's Ann. Civ. St.) does not define who are 'interested parties affected' by orders granting exceptions to rule 37, but does authorize such interested parties so affected to attack such orders by suit. Obviously such a definition, if attempted by the Legislature, would not be practicable. **Whether such exception 'affects' the interest or property rights of a leaseholder who attacks it is generally a fact question dependent upon the facts and circumstances of the particular case, and no hard and fast rule could well be laid down.*** We do not think the

*Throughout this argument the emphasis is supplied.

statute contemplated the inclusion within its terms of those only remotely interested and affected by such order; but **does include those whose lands and property rights are materially and substantially affected by such exception,** though their lands may not immediately adjoin the tract involved. Undoubtedly the well in question did substantially affect the 6 3/4 acres, the south boundary line of which was 430 feet (less than the 660 spacing distance for wells in this area) from the Gulf Production Company's lease. And the density of the drilling in the immediate area of this 6 3/4-acre tract was clearly of such consequence as to affect the Gulf's lease to the south thereof and adjacent to the 40-acre lease of the appellant out of which it was carved. The Gulf offered testimony of R. D. Parker, which was excluded, that if said well were drilled and offsets permitted, a further density of drilling would result in this area which would not only cause waste, but would materially drain oil from the Gulf's lease. Under all the facts and circumstances, therefore, we conclude that the Gulf showed such an interest in the suit as to make it a proper, if not a necessary, party, entitling it to intervene to protect its interests; and that the trial court erred in dismissing it from the suit."

In *Railroad Commission, et al., vs. Gulf Production Company*, 115 S. W. (2d) 505, 508; affirmed, *Railroad Commission, et al., vs. Gulf Production Company*, 134 Tex. 122, 132 S. W. (2d) 254, the Court said:

"The Railroad Commission also contends that appellee, Gulf Production Company, did not show itself to be 'an interested person affected by' the permit here involved, within the meaning of the amended statute, article 6049c, section 8, Vernon's Ann. Civ. St., authorizing it to attack the permit. This contention is not sustained. Of the two wells on Tippett's tract, one was 50 feet and the other 87.5 feet from the line of the Gulf's lease. Whereas, of the two wells on the Gulf lease, south of these two wells, one was 183 feet and the other 141 feet from Tippett's line thus giving Tippett a clear drainage advantage on that side of his tract. The third well granted thereon was located 87.5 feet from the Gulf's line, thus increasing the drainage from the Gulf lease. Manifestly, the Gulf was affected by such permit within the meaning of the statute."

In *Stanolind Oil & Gas Company vs. Midas Oil Company, et al.*, 123 S. W. (2d) 911, 913, (error dismissed, correct judgment), the Court said:

"That is the term (any interested party) the Legislature did use in Sec. 8 of Art. 6049c. Not only is this true, but there is a manifest difference between the subject-matter of Art. 8307 and that of Art. 6049c. In the former, the rights granted to the employee for compensation are personal to him. Whereas, under Art. 6049c, the rights involved, and subject to suit in an attack upon the Commission's order, are not personal, but **the suit so authorized is for the**

protection of the adjacent properties against drainage, confiscation, or damage, irrespective of ownership. The mere fact that the ownership of such property changes hands after the hearing before the Commission has no bearing whatever on the character, extent, or nature of the injuries, if any, which result thereto by virtue of the Commission's order. These are the matters which the Legislature intended to protect and the ownership thereof whether acquired before or after the Commission's order is made, is, we think, but incidental so long as the owner of the property affected seasonably acts under the statute. We conclude, therefore, that the District Court had jurisdiction to try these issues in the suit brought by the Stanolind Oil Company."

In *Smith County Oil & Gas Company, et al., vs. Humble Oil & Refining Company* (writ of error dismissed), 112 S. W. (2d) 220, 222, the Court said:

"The contention of the Attorney General, however, that appellee did not show itself to be an interested party affected by the permit, within the purview of section 8, art. 6049c, Vernon's Statutes, authorizing it to prosecute this suit, is not sustained. Without discussing this question at length, it is manifest we think that if a well be authorized at a lesser distance from the adjacent leaseholder's property line than is prescribed by rule 37; and that if drilled, such adjacent owner will be required to drill offset or additional wells on his own property to protect it against undue drain-

age by such additional well, it is clear that he is an interested party, and that his rights will be affected by the granting of such permit, within the purview of the statute."

In *Murphy, et al., vs. Turman Oil Company*, 97 S. W. (2d) 485, 488, the Court said:

"Nor did the fact that appellee's 30-acre tract was not immediately adjacent to the 3.2-acre tract in question preclude it from bringing this suit. Its lease did adjoin the 10-acre block out of which said 3.2 acres was voluntarily carved. The east line of said 3.2 acres was only 249 feet from the west line of appellee's land, less than the 330 feet from the property lines required by rule 37 at the time, and the evidence showed that, due to the porosity of the sand and the gas pressure in this field, drainage occurred at greater distance than this, and that appellee's lease would be affected by the additional well. Appellee was therefore an interested party within the meaning of the statute (Vernon's Ann. Civ. St. Art. 6049c), and entitled to attack said order."

In *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1027, the Court said:

"The Attorney General contends that since none of those now contesting the granting of the permit in question have applied for and been refused a like special permit, we have no ground to assume that

> such a permit would be refused if requested, and, consequently, there is no evidence of discrimination against them and they are not in a position to complain. However, in our opinion, the adoption and retention of the general provisions of Rule 37 requiring all operators in the East Texas oil field to space their wells at least 660 feet apart is in itself a denial of closer spacing to every operator in the field. In addition, the Act here in question specifically provides that any interested party may contest the granting of such a permit. It has frequently been held that adjoining landowners such as the present protestants are interested within the meaning of the statute."

It is clear from what the Texas courts have said in the above quotations that the terms, "any interested person affected," and "who may be dissatisfied therewith," as those terms are used in Section 8 of Article 6049c, mean a person whose property rights will be injured by the order in question and is dissatisfied with the order. Certainly the statute, as it has been construed and applied in these decisions, means that only dissatisfied persons whose property rights are adversely affected by an order of the Railroad Commission may prosecute a suit under the statute, and that the statute gives them a right or cause of action to protect their property from actions taken under invalid orders of the Commission.

In the instant case, the testimony is abundant and uncontradicted that the drilling of a well under the challenged order and the production of oil from the

well will result in draining large quantities of oil from Respondents' property. The testimony is further undisputed that Respondents have sufficient wells on their lease to produce the recoverable oil under their lease, and that unless the well in question is drilled it would not be necessary for Respondents to drill any additional wells. The testimony is further undisputed that if the proposed well is drilled by Petitioners Hastings and Dodson and oil is produced from it, the cost to Respondents of an offset well would be some ten or twelve thousand dollars; and, that while such offset would reduce the drainage of Respondents' lease by operation of the proposed well on the lease of Petitioners Hastings and Dodson, it would not prevent drainage. (R., 92-93.)

(2) "That in a suit under Section 8 of Article 6049c to cancel an order of the Railroad Commission granting a well drilling permit, the person to whom the permit has been granted is not a necessary party to the suit."

In considering the question as to whether or not the holder of a permit granted by the Railroad Commission to drill a well in exception to Rule 37 is a necessary party to a suit under Section 8 of Article 6049c challenging the validity of such order, this Court should consider the nature of the case relied upon by Petitioners to establish their proposition that the holder of the permit is not a necessary party. *Magnolia Petroleum Companay, et al., vs. Edgar*, 62 S. W. (2d) 359, relied upon in this case on this point by Petitioners, was a suit brought by the Magnolia Petroleum Company to enjoin Edgar from drilling

an oil well. There had been an agreement between Edgar and Magnolia Petroleum Company concerning the number of wells that they would drill on their respective and adjoining tracts. Edgar assigned a part of his lease to Riggs, with the understanding that the assignment would be held in escrow pending the securing of a permit from the Railroad Commission to drill a well on the assigned portion of the Edgar tract. The Railroad Commission refused a permit. A suit was filed attacking this order of the Commission, and in the district court judgment was entered authorizing the drilling of the well. The Railroad Commission was made a party defendant to this lawsuit, but none of the adjoining leaseowners were made parties defendant or given notice of the suit. Final judgment was entered by the district court in that case without the knowledge of Magnolia Petroleum Company. Magnolia Petroleum Company then brought suit against Edgar to enjoin the drilling of the well authorized by the court decree, urging, among other contentions, that the judgment of the district court authorizing the drilling of the well was void upon its face and not binding upon Magnolia Petroleum Company because it was a necessary party to the suit. In that case the court held that the Railroad Commission was the only necessary party to the suit challenging the Commission order, but that was a suit attacking an order of the Commission refusing the applicant a permit to drill. The instant suit challenges an order of the Railroad Commission granting Hastings and Dodson a permit to drill. Hastings and Dodson have a permit to drill a well, and if

the permit is valid they have a property right in the permit. Respondents contend that the order granting the permit is invalid and that operation of the well under the permit and the production of oil from it will injure Respondents. Respondents therefore sue, attacking the validity of the permit, and seeking an injunction restraining any drilling operations under the permit or production of oil from any well drilled under the permit. (R., 11.)

The suit involves the property rights of Hastings and Dodson, and asks an injunction against them. Petitioners overlook this feature of the case. Ordinarily, all persons against whom an injunction must run in order to make it effective, or whose property rights will be affected by the relief asked, are necessary parties to the suit. (*Abrahams vs. Vollbaum*, 54 Tex. 226; *City of Dallas vs. Couchman*, 249 S. W. 234; *Holt & Co. vs. Wheeler County*, 235 S. W. 226; *Basham vs. Holcombe*, 240 S. W. 691; *Matagorda Canal Company vs. Markham Irr. Co.*, 154 S. W. 1176; *Dwyer vs. Hackworth*, 57 Tex. 245.) The rule is fundamental in equity jurisprudence.

Other cases bearing upon who are necessary parties to a suit to set aside an order of the Railroad Commission granting some right or privilege to another are: *Railroad Commission of Texas, et al., vs. Rau*, 45 S. W. (2d) 413, 416; *North Texas Coach Company vs. Morten*, 92 S. W. (2d) 263, 265; *Turman Oil Company vs. Roberts, et al.*, 96 S. W. (2d) 724, 726; *Reynolds, et al., vs. Ward Oil Corp., et al.*, 157 S. W. (2d) 457.

(3) "That Section 8 of Article 6049c provides procedural rights and does not affect substantive rights of the parties."

Petitioners contend that the statute provides a procedure and that it does not create any "new substantive right." This contention Respondents believe to be contrary to the sense of cases decided under the statute.

Sections 8, 10 and 11 of Article 6049c (quoted in the appendix to Petitioners' argument) are clearly separable provisions of the Act of which they are a part. Section 8 provides that "any interested person affected" by Railroad Commission orders, and who is "dissatisfied" with them, "shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission or the members thereof, as defendants "*to test the validity*" of any such order. Section 10 imposes limitations upon the granting of injunctions and temporary restraining orders by the Texas Courts. Section 11 contains provisions relating to appeals.

In *Alpha Petroleum Company vs. Terrell*, 122 Tex. 257, 59 S. W. (2d) 364, 367, the Court, with citation to cases involving other statutes, treated Section 8 as giving a right of attack which is not based on the common law or constitutional jurisdiction.

In *Railroad Commission vs. H. & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750, involving the Act of 1891, referred to in "Argument for Respondents on Re-Argument of the Cause" (appendix, p 28), the Attorney General contended that the Act of 1891 only contemplated that the rules of the Commission could be set aside by the courts when such rules amounted

to the taking of property without compensation or without due process of law. The court discussed this question at length, and demonstrated "that the purpose and intention of the statute mentioned were to confer on the court a statutory power or jurisdiction to review the orders, rules, etc., of the Commission that did not exist under the Constitution, and did not exist absent the statute." *(Alpha Petroleum Co. vs. Terrell*, 122 Tex 257, 59 S. W. (2d) 364, 369.)

In the *Alpha* case, in discussing the proper construction of Article 6049c, Section 8, the Court made the quoted statement concerning the opinion in the *H. & T. C. R. Co.* case. If the statute gives the court a power to review the orders of the Commission and hold them invalid, on grounds "that did not exist under the Constitution and did not exist absent the statute," then obviously the statute affects the substantive rights of the parties and is not purely procedural in nature.

In granting or refusing a permit to drill a well in exception to Rule 37, the Railroad Commission exercised *quasi-judicial* powers. *(Gulf Land Company vs. Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73, 81; *Magnolia Petroleum Company, et al., vs. Railroad Commission, et al.*, 128 Tex. 189, 96 S. W. (2d) 273, 275.) In a suit challenging the validity of such an order, where it has been granted, as here, "to prevent, confiscation of property," the court is to determine whether or not there existed, at the time the Commission order was entered, sufficient facts to support the order. *(Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030.) Such is the

issue under the statute, as it has been construed by the Supreme Court of Texas. The question to be litigated is purely judicial in character. The right to have the order invalidated because of the absence of facts sufficient to justify it, calls upon the court to find what the facts were, and the right is one which the plaintiff in suit may urge because of the statute, and which he could not urge except for the statute.

Gulf Land Co., et al., vs. Atlantic Refining Co., et al., 134 Tex. 59, 131 S. W. (2d) 73, 82-83, and *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1028-1030, and the results of those cases, can only be interpreted as treating and construing the statute to grant to the complaining interested party a right to attack the administrative orders of the Commission on bases that do not exist under the Constitution and only exist by reason of the statute.

If the statute creates a right and is not purely procedural, then it does not confine the jurisdiction of cases brought under it to the State Courts, for reasons pointed out on pages 12 to 22 of the "Argument for Respondents on Re-Argument of the Cause."

IN VIEW OF RECENT DECISIONS OF THE TEXAS COURTS, ARE THERE GROUNDS IN THIS CASE SIMILAR TO THOSE EXISTING IN RAILROAD COMMISSION VS. ROWAN & NICHOLS OIL COMPANY, 311 U. S. 614, 615 WHICH MAKE IT APPROPRIATE FOR THE DISTRICT COURT TO DECLINE JURISDICTION OF THE CAUSE?

In contending that this question should be answered in the affirmative, Petitioners are apparently

in conflict with their position that there are not present in this case grounds similar to those existing in *Railroad Commission vs. Pullman Company*, 312 U. S. 496, which would have made it appropriate for the District Court to withhold the exercise of its equity jurisdiction in this case. In connection with the last mentioned question, Petitioners state as follows:

> * * * "If our understanding is correct, the primary basis for the decision in the *Pullman* case is not present in these cases; because the State statute here involved has been construed many times by the State Courts."

Then, in taking the position that grounds similar to those existing in *Railroad Commission vs. Rowan & Nichols Oil Company*, 311 U. S. 614, 615, exist in this case, Petitioners say:

> * * * "We, therefore, submit that it may be said with equal support in the Texas decisions now as at the time of the *Rowan & Nichols* cases were decided (1) that the Texas decisions do not make clear whether the local courts may exercise an independent judgment of what is reasonable, but (2) apparently, according to the Texas cases the standard of reasonableness under the Texas law is substantially the same as the standard of reasonableness used by this Court in testing the validity of an administrative order under the Due Process Clause (with the exception which we have already pointed out, that under the special

> Texas statutory appeal, the complaining party does not have to show actual injury to his property interests)."

As Respondents interpret the argument, Petitioners say under one point that the statute involved in this case has been construed many times, and in argument under the other point that the decisions do not make clear "whether the local courts may exercise an independent judgment on what is reasonable." The question in this case is not "what is reasonable," but were the facts existing at the time the order was entered sufficient to justify the Commission action.

It seems to Respondents that the statement of the Supreme Court in *Railroad Commission, et al., vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030, makes crystal clear what the Court is to determine in this case in testing the validity of a permit to drill a well, granted "to prevent confiscation of property." There the Court said:

> * * * "In Texas, in all trials contesting the validity of an order, rule or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether, at the time such order was entered by the agency there then existed sufficient facts to justify the same."

The Court is not to substitute its discretion for that committed to the Commission. But, "If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."

There is no uncertainty in these quoted portions from the opinion of the Supreme Court in the *Shell* case. Did the evidence before the Court in the instant case show that the property of Petitioners Hastings and Dodson was not being confiscated? The right to assert that facts existing at the time the challenged order was entered were not sufficient to support a finding that Petitioners' property was being confiscated exists by reason of the statute. Will the order have the effect to deprive Respondents of their property without due process of law? The right to inquire into this question exists under the Constitution. Those are judicial questions to be tried by the Court in this case, and the extent of the review in such a case and the issues are clearly defined by the construction which the Supreme Court of Texas has placed upon the statute giving the interested party the right to review in a judicial proceeding the orders of the Railroad Commission granting permits in exception to the general spacing rule.

WHEREFORE, Respondents submit that the order and judgment of the Circuit Court of Appeals should be affirmed.

E. R. HASTINGS,
Tulsa, Oklahoma,

DAN MOODY,
Austin, Texas,
Attorneys for Respondents.

Copies of this Argument have been furnished to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistants Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL.,
Petitioners,

VS.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents.

PETITION FOR REHEARING

E. R. HASTINGS,
Tulsa, Oklahoma,
DAN MOODY,
Austin, Texas,
Attorneys for Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, ET AL.,
Petitioners,

VS.

SELBY OIL & GAS COMPANY, ET AL.,
Respondents.

PETITION FOR REHEARING

Respondents Selby Oil & Gas Company and Lewis Production Company, complaining of Petitioners Railroad Commission of Texas, the members of the Railroad Commission of Texas, and O. L. Hastings and C. F. Dodson, petition the Court for a rehearing of the cause, and that on such rehearing the opinion and judgment of the Court of May 24, 1943, be set aside and that the judgment of the Circuit Court of Appeals be affirmed, and as reasons therefor show:

I.

Pretermitting for the present any discussion of questions raised by the claim of rights under the

Fourteenth Amendment, there is a distinction between this suit and Cause No. 495, *G. E. Burford, et al., Petitioners, vs. Sun Oil Company, et al., Respondents*, and between this suit and Cause No. 496, *Sun Oil Company, et al., Petitioners, vs. G. E. Burford, et al., Respondents*, in that the latter mentioned causes involve a number of issues which are to be determined by the application of rules of local law; whereas this suit ultimately involves only one issue to be determined by rules of local law, namely, the law question as to whether or not at the time the challenged order was entered by the Railroad Commission there existed sufficient facts to justify the order. The rules of local law by which this law question is to be determined have been clearly defined by the Supreme Court of Texas. (*Railroad Commission, et al. vs. Shell Oil Company, Inc., et al.*, 139 Tex. 66, 161 S. W. (2d) 1022, 1930; *Cook Drilling Company, et al. vs. Gulf Oil Corporation*, 139 Tex. 80, 161 S. W. (2d) 1035, 1036.)

II.

This suit does not involve any question of the public policy of the State of Texas or call upon the Courts to take any action in relation to the public policy of the State, for the suit involves only the legal rights of the contending parties in respect to two contentions made by Respondents, which contentions are:

(a) That the necessary result of the challenged order will be to deprive Respondents of their property without due process of law; and,

(b) That at the time the Commission entered the challenged order, there did not exist sufficient facts to justify the Commission action.

The Commission acted in the exercise of *quasi* judicial power in entering the challenged order, as distinguished from legislative power the exercise of which might involve questions of State policy; and the question as to the existence at that time of sufficient facts to justify the Commission action is a question of law and not of State policy.

WHEREFORE, Respondents petition this Court for a rehearing of the cause, and that on such rehearing the opinion and judgment of May 24, 1943, be set aside and that the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

E. R. HASTINGS,
DAN MOODY,
Attorneys for Respondents.

Counsel for Respondents certify that the foregoing petition for rehearing is presented in good faith and not for delay.

DAN MOODY,
Attorney for Respondents.

Copies of this Petition for Rehearing have been mailed to Messrs. Gerald C. Mann, Attorney General of Texas, E. R. Simmons and Jas. D. Smullen, Assistants Attorney General of Texas, Austin, Texas, and Messrs. W. Edw. Lee, Tyler, Texas, and John Porter, Longview, Texas, attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1912

No. 528

O. L. HASTINGS, *et al.*,
Petitioners,

v.

SELBY OIL & GAS COMPANY, *et al.*,
Respondents.

PETITION OF O. L. HASTINGS AND C. F. DODSON FOR REHEARING

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Supreme Court of the United States
OCTOBER TERM, 1942

No. 528

O. L. HASTINGS, *et al.*,

Petitioners,

v.

SELBY OIL & GAS COMPANY, *et al.*,

Respondents.

PETITION OF O. L. HASTINGS AND C. F. DODSON FOR REHEARING

To said Honorable Court:

Now come O. L. Hastings and C. F. Dodson, Petitioners and, petitioning for rehearing, pray that the Court's judgment rendered and entered herein on May 24, 1943, reversing the decision of the Fifth Circuit Court of Appeals and remanding this cause with instructions to dismiss the complaint, be set aside and that they be granted a rehearing and on rehearing the judgment of the Fifth Circuit Court of Appeals be reversed and the judgment of the trial court be affirmed, and therefor say:

GROUND OF PETITION

The court erred in failing and refusing to pass upon the merits of this controversy, and in failing and refusing

to reverse the judgment of the Fifth Circuit Court of Appeals and affirm the judgment of the trial court in favor of petitioner.

REMARKS

No question of State's rights is involved; yet the decision is made to turn upon prevention of friction between the State and the Federal judiciary.

The author is a part of that section of the country that has demonstrated time and again its adherence to the doctrine of State's rights, but the pervading thought in that same section is that powers conferred upon the Federal Government in precise wording in the Constitution were put permanently beyond the state and federal agencies. That written into the Constitution became and is the fundamentary law of the land—until changed by amendment by the people and not by any court. On the Federal Judiciary, created by Article III of the Constitution, was conferred judicial power in both law and equity cases (without distinction) over controversies "between citizens of different states." The right to proceed in a federal court where diversity exists is a legal right, vouched by the fundamental law of the land.

This Court is a creature of the same document that creates a right in litigants to go into federal courts where diversity of citizenship exists. We have been unable to find any warrant therein for the court to deny a litigant the rights afforded thereby. We believe none exists.

Whether this Court may legislate in respect to matters over which the Congress has persistently abstained is one thing; whether it may deny suitors rights plainly vouched by the Constitution is another and of even greater import. The Constitution conferring jurisdiction in law and equity cases alike, without distinction, where is language to be found that makes it discretionary with the Court to deny suitors access to federal courts on the ground that the controversy is one in equity? Can it be that the power of the Court, sitting as Chancellors, transcends the Constitution? Is this Court at liberty to grant or withhold rights vouched litigants by the Constitution?

Even if the prosecution of diversity proceedings can be said to constitute an interference with "independence of State governments in carrying out their domestic policy", such independence was yielded up and parted with by the terms of the Constitution of the United States. The States, like all others, are bound by the provisions of the Federal Constitution and are presumed to act with knowledge just as are others.

This case was tried on the merits and judgment was rendered and entered against respondents, denying the relief prayed. It is respectfully submitted that this court should exercise its jurisdiction and reverse the judgment of the Fifth Circuit Court of Appeals, and affirm the judgment of the trial court.

This petition is presented in good faith and not for delay. A copy of same has been delivered to the Honorable Dan

Moody, attorney for respondents, and to the Attorney General of Texas, attorney for the Railroad Commission and its members.

Respectfully submitted,

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Longview, Texas,

W. EDWARD LEE,
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Tyler, Texas,
Counsel for Petitioners O. L. Hastings and C. F. Dodson.

SUPREME COURT OF THE UNITED STATES.

No. 528.—October Term, 1942.

O. L. Hastings, et al., Petitioners, vs. Selby Oil & Gas Company, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 24, 1943.]

Mr. Justice Black delivered the opinion of the Court.

This is an action in the nature of an equity proceeding brought by the respondents to cancel an order of the Texas Railroad Commission granting petitioners Hastings and Dodson a permit under Rule 37 of the Railroad Commission to drill an oil well. The Respondents contend that the order granting a permit to the petitioners deprives them of property without due process of law, and that the order is invalid as a matter of Texas law. Jurisdiction is rested on diversity of citizenship.

There are no significant differences between the problems presented here and those in *Burford* v. *Sun Oil Co.*, decided this day. For the reasons set forth in that opinion, the decision below is reversed and the cause is remanded with instructions to dismiss the complaint.

It is so ordered.

The Chief Justice, Mr. Justice Roberts, Mr. Justice Reed, and Mr. Justice Frankfurter dissent for the reasons stated by them in dissent to *Burford* v. *Sun Oil Co.*, Nos. 495 and 496.